UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

COMMSCOPE, INC.,

Plaintiffs,

. Case No. 19-cv-15962

vs.

ROSENBERGER TECHNOLOGY

. Newark, New Jersey

KUNSHAN CO., LTD., et al.,

. January 25, 2024

Defendants.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE LEDA DUNN WETTRE UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

This transcript has been SEALED (AVAILABLE FOR PARTIES; NOT AVAILABLE FOR THE PUBLIC) pursuant to Loc. Civ. R. 5.3(c)(2).

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                    (Commencement of proceedings)
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              THE COURT: Okay. We are on the record in
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    CommScope Inc., et al., versus Rosenberger Technology, et
 4
    al., 19-cv-15962.
 5
              I am Magistrate Judge Wettre. We're here for oral
 6
    argument on discovery disputes.
 7
              And may I have appearances, please, starting with
 8
    the plaintiffs.
 9
              MR. SPONZILLI: Thank Your Honor. Edward Sponzilli
10
    of the law firm Norris McLaughlin. We're local counsel to
11
    the plaintiffs.
12
              THE COURT:
                         Good afternoon, Mr. Sponzilli.
13
              MS. SALMON-SMITH: Good morning, Your Honor.
14
    Tracey Salmon-Smith. I'm with Faegre Drinker Biddle & Reath
15
   here in New Jersey.
16
              THE COURT: Good afternoon.
17
              MS. MAPPES: Harmony Mappes, Your Honor. Also with
18
    Faegre.
19
              THE COURT:
                         Good afternoon to you.
20
              MR. KAHNKE: Randy Kahnke, Your Honor. Also with
21
    Faegre.
22
              THE COURT: Good afternoon.
23
              MR. KAHNKE: Good afternoon.
2.4
              THE COURT:
                          And --
25
              MS. SALLSTROM: Anna Sallstrom with Faegre.
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1
              THE COURT:
                          Okay.
 2
              MR. WASHBURN: Bryan Washburn also with Faegre.
 3
              THE COURT:
                         Okay. Welcome. And if you'd rather
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    sit in the jury box, that's okay too. If you want to be
 5
    closer to your co-counsel. It doesn't matter to me.
 6
   we short-changed you on the table, I see.
 7
              All right. And for defendants?
 8
              MR. EICHHORN: Your Honor, Daniel Eichhorn from
 9
    Cullen and Dykman. I'm local counsel.
10
              THE COURT: Okay. Good afternoon.
11
              MR. MILLER: Daniel Miller from King & Wood
12
   Mallesons.
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              THE COURT: Good afternoon.
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              MS. HE: Good afternoon. Yi He, also with King &
15
   Wood Mallesons.
16
              THE COURT:
                         Good afternoon.
17
              MR. SKLAR:
                          Andrew Sklar from King Wood Mallesons.
18
                          Okay. Good afternoon.
              THE COURT:
19
              MR. PELLEGRINO: Nick Pellegrino from King Wood &
20
   Mallesons.
21
              THE COURT: Good afternoon.
22
              MR. FILARDO: Good afternoon, Your Honor. Vincent
23
    Filardo Jr. from King Wood Mallesons.
2.4
              THE COURT: Okay. Good afternoon to you.
25
              All right, everyone.
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So just for the record, I'll just state the docket numbers of the joint submissions I received on discovery. I have before me ECF 562 and ECF 566. I also have two books of exhibits that correspond to each of the letters. And I just wanted to let you know I have thoroughly read everything more than once, and digested it. So you can save time in going through basics. You do not have a cold bench today or an unprepared one.

So what I've done in all honesty is I've taken the issues and I've mapped out an oral opinion after considering and reconsidering and looking at cases.

That said, I do keep an open mind for oral argument; otherwise, I wouldn't bother dragging you in here. So I'll have you argue each issue. I'm figuring -- it has to be a short amount of time per issue -- maybe five minutes, go to the heart of it and don't waste time on the edges.

And then I will take a look silently at my oral opinion and see if I want to modify it based upon what I've heard. I will likely ask you some questions; more on some issues than others.

And then, you know, we can certainly take a break or two -- I'll probably need one and just to give you all a break.

I was in the Supreme Court watching argument on the Chevron issue last week -- I think it was last week and not

- 1 the week before. And Justice Thomas had to take a break, and 2 Chief Justice Roberts didn't even stop for him. They went 3 for two hours and 15 minutes, and I thought, boy, I'd like to 4 get up and leave like Justice Thomas. 5 So I won't do that to you today. So that said, I'm going to take the 6 All right. 7 issues in the order in which you submitted them. So we'll 8 start with, you know, the one meatily briefed issue in 9 ECF 562. It is really CommScope's "ask," if you will; so 10 I'll hear from CommScope on that first issue for about five 11 minutes, and then turn it over to Rosenberger. 12 MS. MAPPES: Thank you, Your Honor. 13 THE COURT: And, Ms. Mappes, wherever you're 14 comfortable. I am not offended if you stay at counsel table. 15 You can come up to the podium. I'm sorry that I don't have a 16 shelf for you. 17 MS. MAPPES: I'll come up, Your Honor. 18 be just fine. 19 THE COURT: All right. Very good. 20 MS. MAPPES: One quick housekeeping note, we 21 typically have sealed --22 THE COURT: Yes, thank you. Thank you. 23 right on the top of my notes.
- MS. MAPPES: So did I.
- 25 THE COURT: So everyone in the courtroom now -- and

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1
    I'll ask counsel to look around -- is privy to all of the
 2
    information marked confidential and highly confidential under
    the confidentiality order?
 3
 4
              MS. MAPPES: Yes, Your Honor.
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              THE COURT:
                         I see a lot of nodding heads. Okay.
              So I'm going to seal not only the record but the
 6
 7
    courtroom because this hearing will discuss extensive
 8
    information of the parties that was marked confidential or
 9
   highly confidential pursuant to the confidentiality order
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    that the Court entered.
11
              So rather than formally locking the door, just you
12
    all keep an eye on the door, and if somebody wanders in who
13
    you don't know to be privy to confidential information, just
14
    give me a wave. Okay?
15
                           Thank you, Judge.
              MS. MAPPES:
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              THE COURT:
                          Go ahead, Ms. Mappes.
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              MS. MAPPES: Good afternoon, and may it please the
18
            I'm Harmony Mappes for CommScope on Issue Number 1.
19
              Production of CommScope's BSA component design
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    files is core foundational discovery that was to be done and
21
    that was ordered at the very outset of discovery, yet
22
    CommScope learned for the first time in depositions
23
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And, of course, these employees can have no privacy interests in CommScope's trade secret information, which is all CommScope is seeking from these devices. As the case law we rely on explains, an employer should not be able to shield itself from discovery by claiming it has no control over work-related materials on an employee's personal account or device. Such a rule could have the potential to incentivize employers to require the use of personal accounts for business purposes. And this would cut against the federal rules which allow for broad discovery and would inhibit the resolution of cases on their merits.

These sorts of perverse incentives are acute in a case like this, Your Honor, where if Rosenberger is allowed to shield these documents,

. That cannot

25 | be how this works.

11

1 I'd also like to address the cost-shifting 2 argument, Your Honor. 3 4 but only if CommScope 5 pays the cost of restoring, searching, and hosting the data. Had Rosenberger searched for and produced these documents 6 7 during the course of document discovery, as they, through 8 their prior counsel, represented to us and to the Court that 9 they would do, these costs would not even exist. 10 I would also direct your attention to Exhibit 26; 11 This is a quote from Rosenberger's it's the last exhibit. 12 e-discovery vendor, and it says -- and I'll just quote one 13 sentence, Your Honor --14 THE COURT: Just let me catch up with you. 15 MS. MAPPES: Absolutely. 16 THE COURT: Okay. 17 MS. MAPPES: And I'll quote the sentence, 18 Your Honor, just the one-page document 19 20 End 21 quote. 22 Yet Rosenberger is asking for 23 24 Rosenberger cannot meet its burden here to shift 25 these costs to CommScope.

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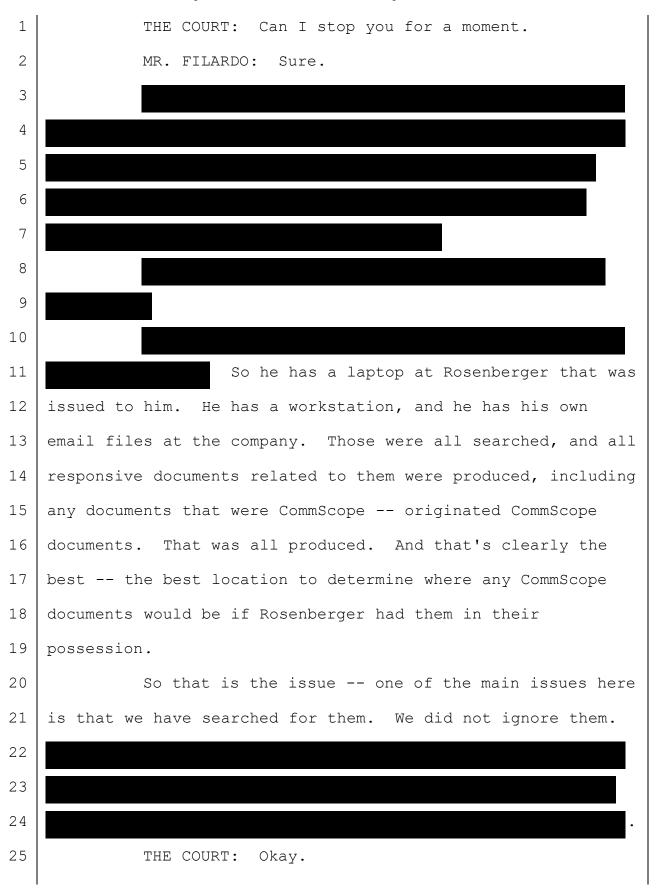
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In sum, we respectfully request that the Court order Rosenberger to produce CommScope's trade secret design files regardless of where they were stored. CommScope also requests additional deposition time to address these issues. I'm happy to answer any questions, of course, but I'll leave it there. THE COURT: Okay. Thank you, Ms. Mappes. I have no questions. MS. MAPPES: All right. MR. FILARDO: Good afternoon, Your Honor. Vincent Filardo from King and Wood Mallesons. Briefly, I'd like to first address the issues related to Mr. Yang and his computer, and then I'll address the issues related to Sheng Linfeng. And that's the employee who would need to have his data restored in order to search it. So with respect to Mr. Yang, Your Honor, to the extent there are any CommScope documents on his personal laptop, that would have occurred while he was an employee at CommScope. There is nothing in the record and we have found no evidence that suggests he ever used that laptop while he was at Rosenberger. And, indeed, he was issued a Rosenberger laptop and also worked at a Rosenberger workstation. And those documents have all been searched, and all responsive documents --



14

MR. FILARDO: Now, the issue arises again whether or not we have that kind of access to his laptop. And even the cases that CommScope cites to -- I think it's the In re Skanska case, which is a Northern District of Florida case, and that case was rather aggressive in allowing a personal device of an employee to be accessible. Even the court there found that it didn't require the company to actually search that device. It required the company to ask the employee to search it so as to leave no doubt that there would not be any access to personal information and private information. But I don't think the Court needs to go that far here, Judge, because we've looked at the stuff that Mr. Yang had brought to CommScope -- and Rosenberger. And that's been produced to CommScope. THE COURT: Where is that? That is not -- that is not produced MR. FILARDO: to the Court, Your Honor. That has not been produced.

is in the record, though.

Essentially they ask --

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1 2 When was this interrogatory answered THE COURT: 3 4 5 MR. FILARDO: Interrogatory -- the verification is 6 dated January 24, 2020. The actual responses and objections 7 are dated January 17, 2020. 8 9 Is that in your submission? 10 THE COURT: 11 MR. FILARDO: They aren't, Your Honor. 12 THE COURT: They are or aren't? 13 MR. FILARDO: They are not. These are --14 THE COURT: Are they referenced in 562, the joint 15 dispute letter? 16 MR. FILARDO: They are not, Your Honor. These are issues that we discovered after our submissions to 17 18 determine -- you know, in response to some of the assertions 19 that were made in reply in the joint submission. 20 So he was identified in that document as well as an 21 22 And, moreover, Your Honor, I think more --23 THE COURT: Was he identified in the negotiations 24 of the ESI order that was entered in January 2021 as a person 25 who should be a custodian for those searches?

16

MR. FILARDO: He was also identified in that too. 1 2 In CommScope --3 Why didn't you put it in your THE COURT: submission? 4 5 MR. FILARDO: Your Honor --THE COURT: I prepared many hours for this. 6 7 now I'm hearing new information while you're on your feet? 8 MR. FILARDO: I apologize for that, Your Honor. 9 But I think the issue was more that since we were willing to 10 try to agree with CommScope to produce the stuff if they 11 would shift the cost, that it wouldn't be necessary to burden 12 the Court with that. 13 But after their reply came in where they made 14 several assertions that they didn't know about this quy, I 15 thought it was appropriate for us to identify this to the 16 Court. 17 THE COURT: Okay. 18 MR. FILARDO: And I think -- I think more important 19 than even the interrogatories and the letter from Milbank is 20 that when the parties were negotiating the custodian list, 21 CommScope had in their proposed custodian list identified 22 Mr. Sheng Linfeng as one of, I think, 55 custodians at the 23 time. He was Number 36. 24 Ultimately, the parties agreed to a smaller subset 25 of that, and he was not in that subset. He was taken out by

17

1 CommScope. 2 So when it came to this Court and Your Honor I believe there were -- I think it was 21 that we could agree 3 4 on and then another 14 that CommScope wanted for a total of 5 35 and then ultimately Your Honor allowed another seven, so a 6 total of 28. 7 And even in those 14 that CommScope had requested 8 from the Court, they didn't request Mr. Sheng Linfeng. 9 was taken out from their original custodian list. 10 So I am -- was taken aback by some of the 11 assertions that they didn't know about him and that we were 12 unwilling to -- that we should have --Well, you ought to have put that in 13 THE COURT: 14 your submission if you were taken aback. 15 MR. FILARDO: It was after the fact that I saw the 16 reply. 17 THE COURT: Thank you. 18 Ms. Mappes, will you respond to that? Just the 19 point about Linfeng, 20 21 Yes, Your Honor. MS. MAPPES: 22 does not make any 23 difference. Everybody understood at the time -- indeed, 24 according to Rosenberger's prior counsel, targeted 25 collections were going to happen to get design files

1 regardless because they're not susceptible to search terms. 2 As Your Honor knows, we had lot of back-and-forth; we had multiple hearings about this. And part of the reason 3 4 we could take some of those custodians off the list was 5 because Rosenberger's prior counsel represented, "We are 6 doing targeted collections. We understand that design files 7 do not always show up in searches." 8 And we fully understood that they were collecting 9 all of our design files regardless of where they were. 10 THE COURT: Okay. All right. Thank you. 11 Please sit down. 12 Let me just go through my notes on this. (Pause in proceedings) 13 14 THE COURT: Okay. Before the Court are several 15 discovery disputes briefed by the parties prior to this 16 hearing at ECF Numbers 562 and 566. 17 I have just heard oral argument on the first issue, 18 which was presented in ECF 562. I am ready to issue my 19 ruling on that. 20 But, first, a brief bit of background. 21 This is an action in which CommScope contends that 22 its trade secrets concerning base station antennas were 23 misappropriated by defendants, who are competitors in the BSA 24 market, in violation of several statutes. See the Amended 25 Complaint at ECF 50. I will jointly refer to the defendants

as "Rosenberger."

A primary way in which CommScope contends trade secrets were misappropriated by Rosenberger is through former CommScope employees who brought the alleged trade secrets to Rosenberger when they subsequently became employed there.

See ECF 50, paragraphs 47 to 52.

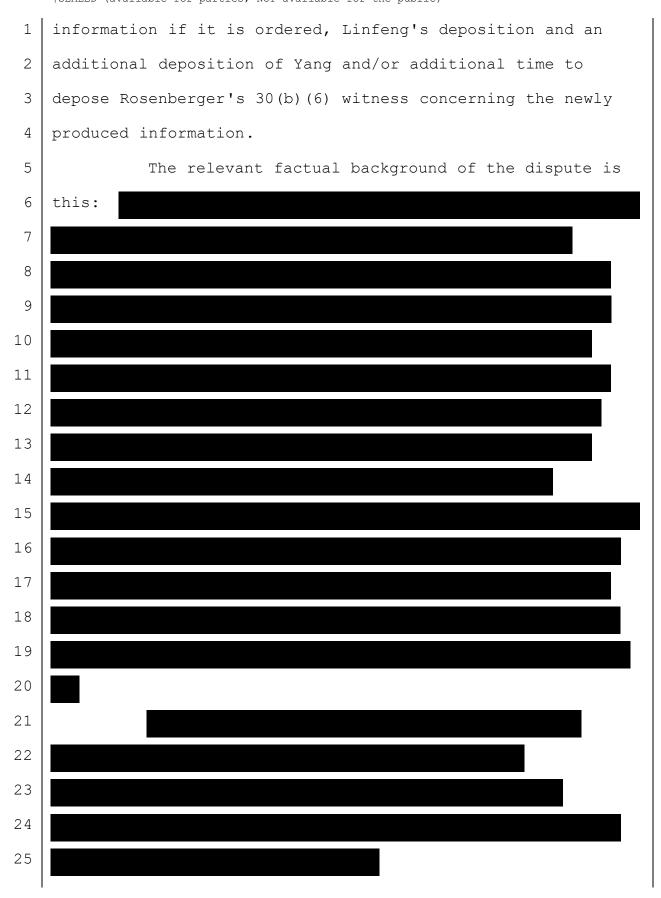
The Court has been supervising discovery in this action since 2019 and has had several lengthy hearings to resolve disputes and, as such, is very familiar with the issues in this action and the history of discovery.

Under the most recently entered case management order pertaining to fact discovery, written discovery closed April 27th, 2023, and even that period was provided solely for supplementing written discovery, given the prior years of document discovery that were afforded to the parties. And deposition discovery closed on November 17th, 2023. See the Case Management Order at ECF 530.

The first issue in dispute before the Court concerns two of the former CommScope and now-Rosenberger employees, Charles Yang and Sheng Linfeng. CommScope seeks an order compelling

25 CommScope further seeks, after production of such

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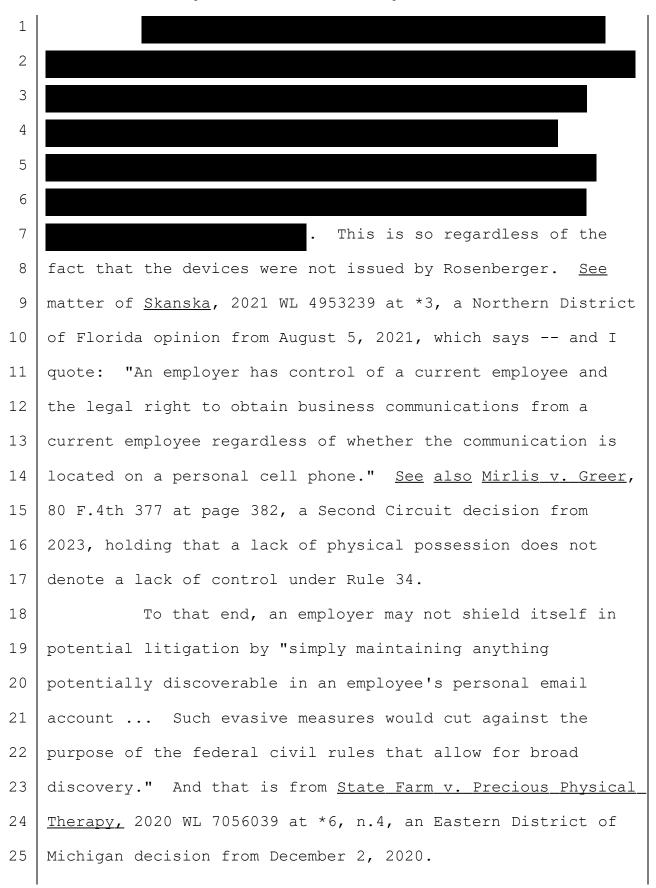
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21

First, the Court finds that the information sought is relevant and proportional within the meaning of Rule 26. The Court has previously held that Rosenberger's possession of CommScope's design files is highly relevant to CommScope's claims of trade secret misappropriation. CommScope alleges that much of the misappropriated information came through its ex-employees subsequently becoming employed at Rosenberger, and bringing CommScope information with them, Moreover, production of these CommScope design files is proportional to the needs of the case. All the information sought is highly targeted, and even if resources need to be expended to produce it, given the -- and I'm paraphrasing the proportionality factors of Rule 26(b)(1) -given the importance of the issues at stake in the action, the amount in controversy, and the importance of the discovery in resolving the issues, it is proportional within the definition set forth in 26(b)(1). Second, the Court finds that CommScope has met its

Second, the Court finds that CommScope has met its burden of demonstrating that the information on Yang and Linfeng's personal devices is within Rosenberger's control, even if not all of it is within its custody or possession under Rule 34. Control is defined -- and this is a quote -- "control is defined as the legal right, authority, or ability

to obtain documents upon demand." <u>Camden Iron and Metal Inc.</u> v. Marubenii America Corp., 138 F.R.D. 438 at page 441, a District of New Jersey opinion from 1991. Federal courts have construed the definition of "control" broadly under Federal Rule of Civil Procedure 34. See id. <u>See</u> ECF 562 at 5. Thus, it is an open question. See Exhibit 8. Nothing in the briefing from Rosenberger states that Yang has or would refuse to provide the information from -- the CommScope information upon his personal devices to Rosenberger, if To the contrary, See ECF 562 at 16.



The Court therefore concludes that Rosenberger has sufficient control over the specific and highly relevant content that CommScope seeks and must produce it.

. Accordingly, control is not at issue here, and Rosenberger does not rely on any other basis beyond the purported cost to resist producing what is clearly discoverable information.

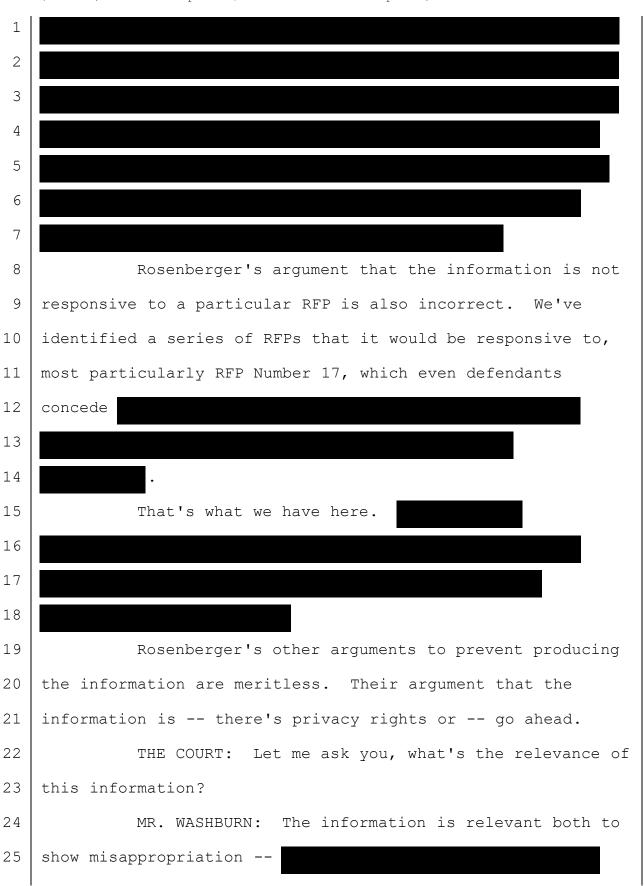
As for cost shifting, the Court will address this in a little while.

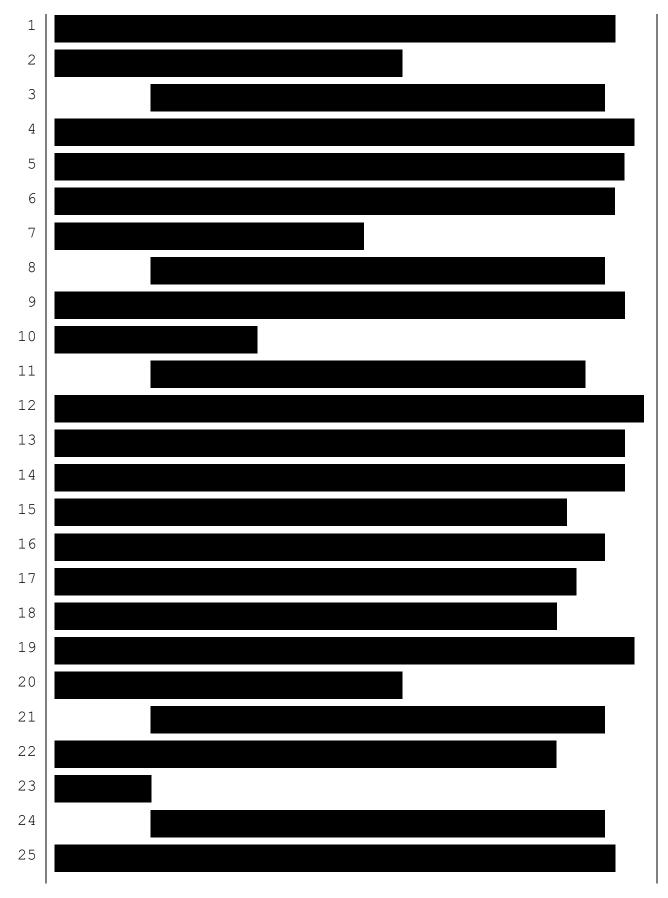
Third, I do not find that CommScope waived any right to seek this information. In an effort not to unduly burden Rosenberger in discovery, the Court cabined the scope of the discovery available to CommScope early on, requiring an iterative approach to searching Rosenberger's records for allegedly misappropriated design files. The Court repeatedly assured the parties, in denying certain broad requests for discovery, that as discovery unfolded and revealed additional potential sources of information, the Court would allow discovery to be expanded to those areas accordingly and in a targeted manner.

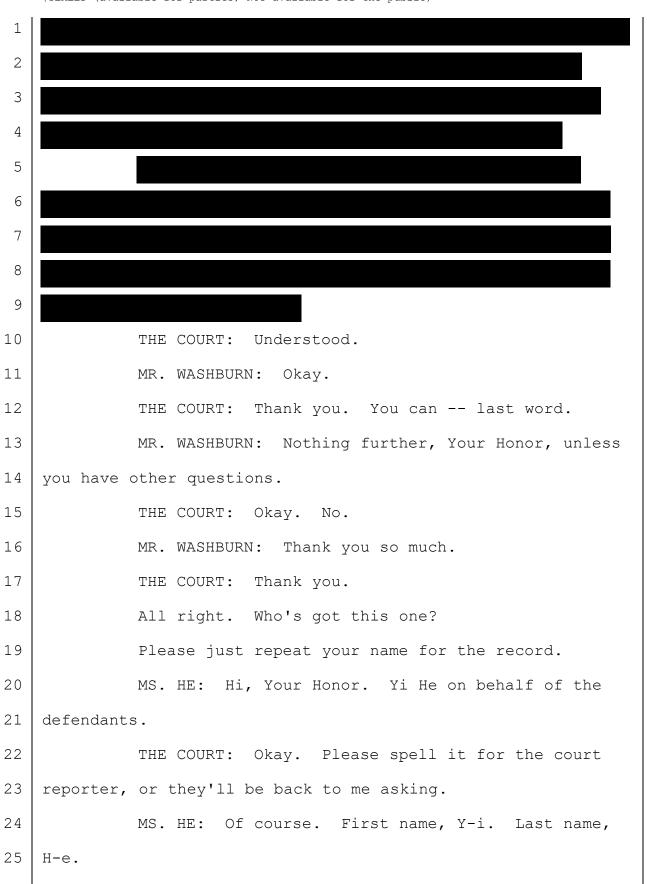
That is exactly what occurred here where CommScope

1 learned at depositions in the fall of 2023 that 2 3 4 5 The Court rejects Rosenberger's arguments that 6 CommScope slept on its rights. 7 To the extent that Rosenberger argues that 8 CommScope should have found through its own servers that Yang 9 and Linfeng sent the files to their personal devices while 10 they were still CommScope employees, the Court finds this 11 argument ignores that CommScope had deleted those employees' 12 email accounts in the ordinary course of business before this 13 litigation commenced. 14 The Court therefore orders Rosenberger to produce 15 all CommScope design files of Linfeng in its possession and 16 that are found on Yang's and Linfeng's personal devices. 17 Finally, the Court rejects Rosenberger's request to 18 shift costs of this production onto CommScope. 19 presumptive rule is that parties pay for their own production 20 of information. Cost-shifting is appropriate only for 21 inaccessible data, which archived data is not considered to 22 See Juster Acquisition Company v. North Hudson Sewerage 23 Authority, 2013 WL 541972 at *3, a District of New Jersey 24 decision from February 11, 2013. And even if the data were 25 considered inaccessible, the fact that Rosenberger rendered

1 it inaccessible by archiving information it knew to be 2 directly relevant and responsive to CommScope's discovery requests during discovery in this action is on Rosenberger. 3 4 Rosenberger's decision to take highly relevant information 5 and make it time-consuming and expensive to retrieve was its 6 own erroneous judgment, and CommScope should not literally 7 have to pay the price for it. 8 CommScope may also depose Yang and Linfeng and/or 9 Rosenberger's 30(b)(6) designee about the design files after 10 they are produced. 11 I will not prejudge how much time CommScope is 12 allotted as we do not yet know the extent of the information that will be produced. The parties are to meet and confer 13 14 about that at the appropriate time after the documents or 15 electronically stored information is produced. 16 Okay. 17 Let's go to Issue 2. It's a CommScope "ask," so 18 CommScope may argue it first. 19 MR. WASHBURN: Good afternoon, Your Honor. 20 Washburn from Faegre Drinker on behalf of CommScope. 21 Issue Number 2 is asking the Court to issue an 22 order directing Rosenberger to produce its HR investigation 23 and subsequent disciplinary records for its employees 24 25 That investigation conducted







|19-cv-15962, January 25, 2024 |SEALED (available for parties; NOT available for the public) 1 On behalf of defendants to argue Issue Number 2, 2 the requests made by the plaintiffs are not relevant nor 3 proportional to the needs of this case in light of all the 4 discovery the parties have had over the years. And more 5 importantly, it intrudes upon the privacy interests of the 6 employees. 7 At no --8 THE COURT: What if we redacted the names -- you 9 redacted initially the names of the employees? Or -- I'm 10 sorry. That wouldn't help CommScope identify 11 12 If it was stamped as confidential pursuant to the 13 confidentiality order and only the lawyers in this case could 14 see the 15 16 17 Respectfully, no, Your Honor. The reason 18 is because, first of all, at nowhere during the 30(b)(6) 19 deposition 20 21

THE COURT: Tell me where it is so I can follow along.

25 MS. HE: Of course.

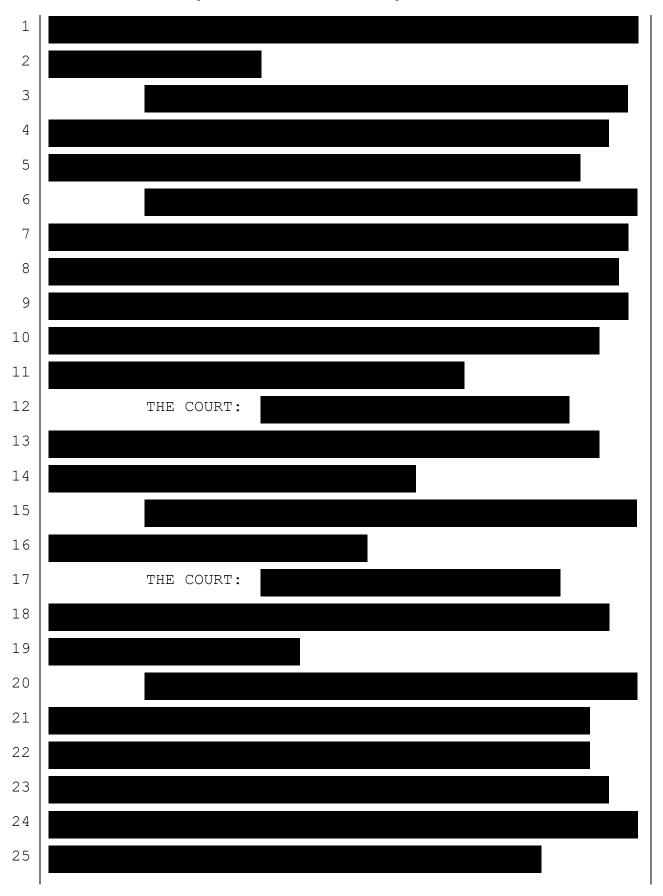
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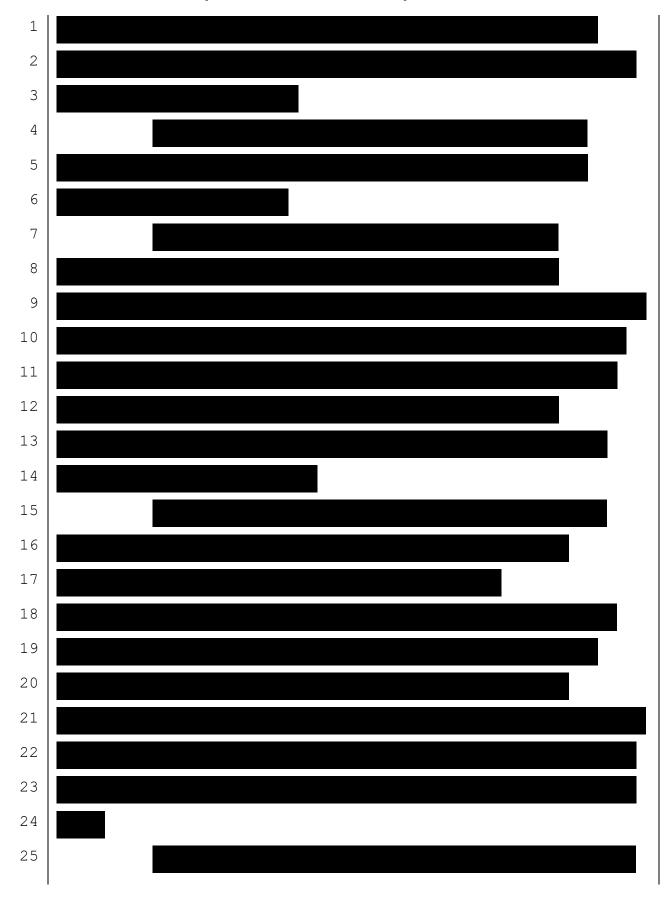
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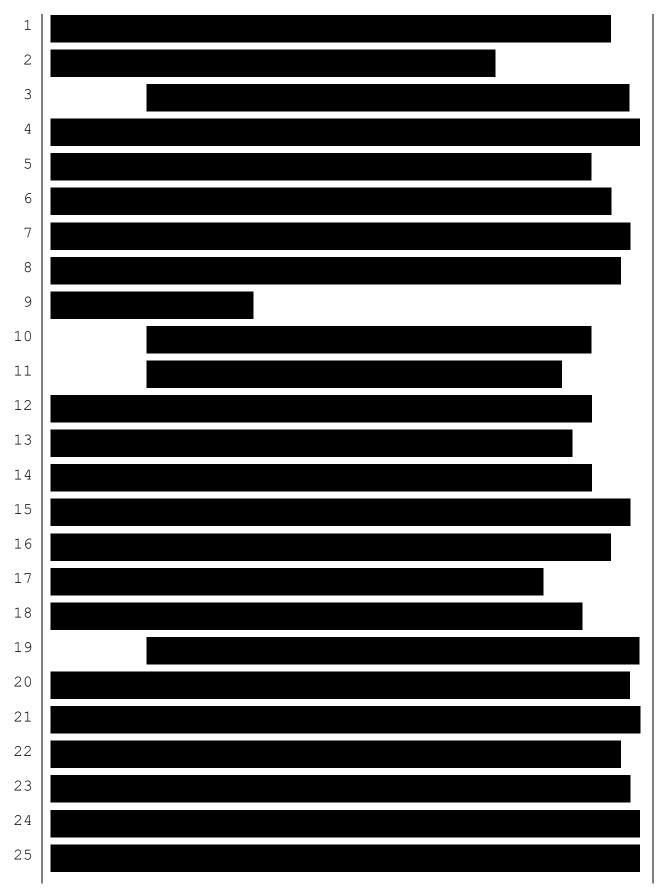
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1 THE COURT: By Bates stamp? It's in the deposition of this 30(b)(6) 2 MS. HE: 3 It's on page 452. And I'm looking at lines 10 to witness. 4 13. 5 THE COURT: Sorry. Which exhibit? 6 MS. HE: It's Exhibit AA to the --7 THE COURT: AA? 8 MS. HE: Yes. 9 THE COURT: Okay. Give me a second. I'm sorry, Your Honor. It's Exhibit A. 10 MS. HE: 11 THE COURT: Exhibit A. 12 And tell me again the page? 13 MS. HE: It's page 452. And I'm looking at 14 lines 10 to 13. 15 THE COURT: Okay. 16 MS. HE: 17 18 19 20 21 22 23 24 25

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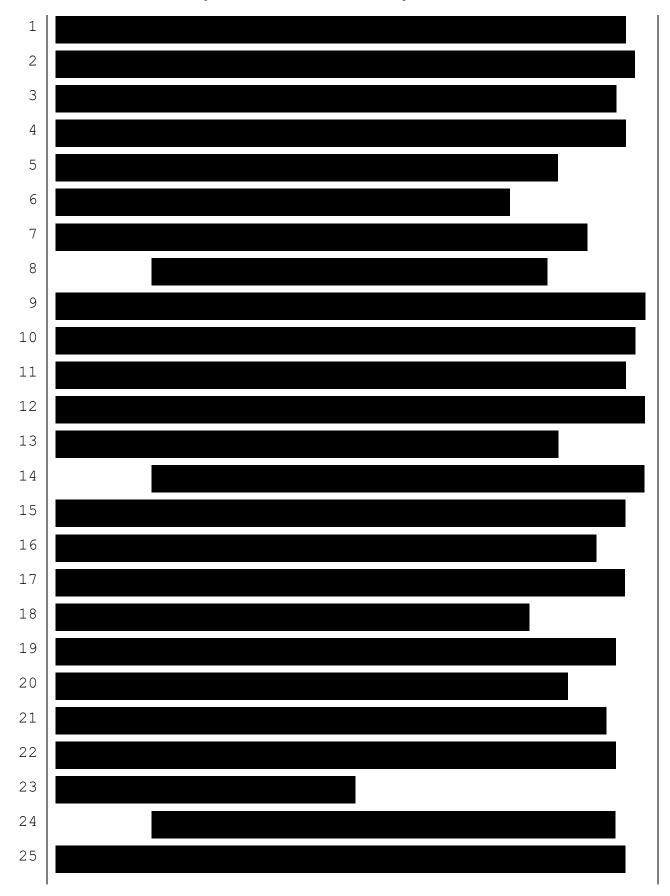
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              THE COURT: Okay. I understand your argument.
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    Thank you.
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              MS. HE:
                       Thank Your Honor.
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                          Mr. Washburn, just briefly, yeah.
              THE COURT:
              MR. WASHBURN: Brief, Your Honor. Thank you.
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 7
              Your Honor, I just want to make a few points.
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              What I heard from Ms. He's argument is they're no
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    longer arguing the information isn't responsive to a
   particular discovery request. They're relying solely on
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11
    relevancy.
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              As I explained in my argument, the information is
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    relevant
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21
              THE COURT:
                          Okay.
22
                             Thank you for your time.
              MR. WASHBURN:
23
              THE COURT:
                          Thank you.
              There were a number of different answers because
24
25
   different entities were named. I did look at affirmative
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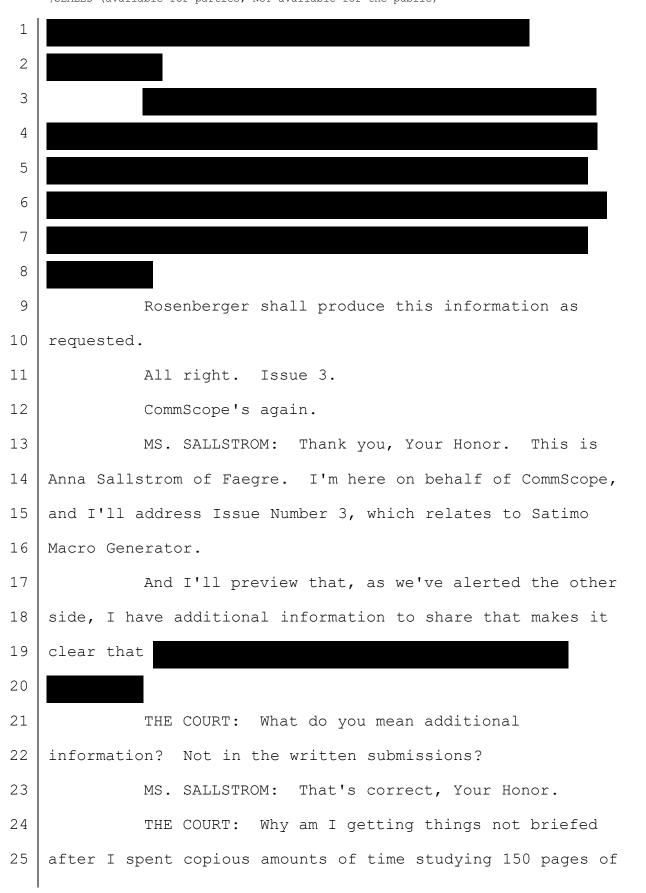
|19-cv-15962, January 25, 2024

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defenses in some of the answers. Is it the same affirmative defense across all the Rosenberger answers --MR. WASHBURN: This is for the main three affirmative -- main three defendants. I believe it's Docket 462, and it's the fifteenth affirmative defense. THE COURT: Which went to its MR. WASHBURN: THE COURT: All right. Give me a moment, please. MR. WASHBURN: Thank you, Your Honor. (Pause in proceedings) THE COURT: Okay.

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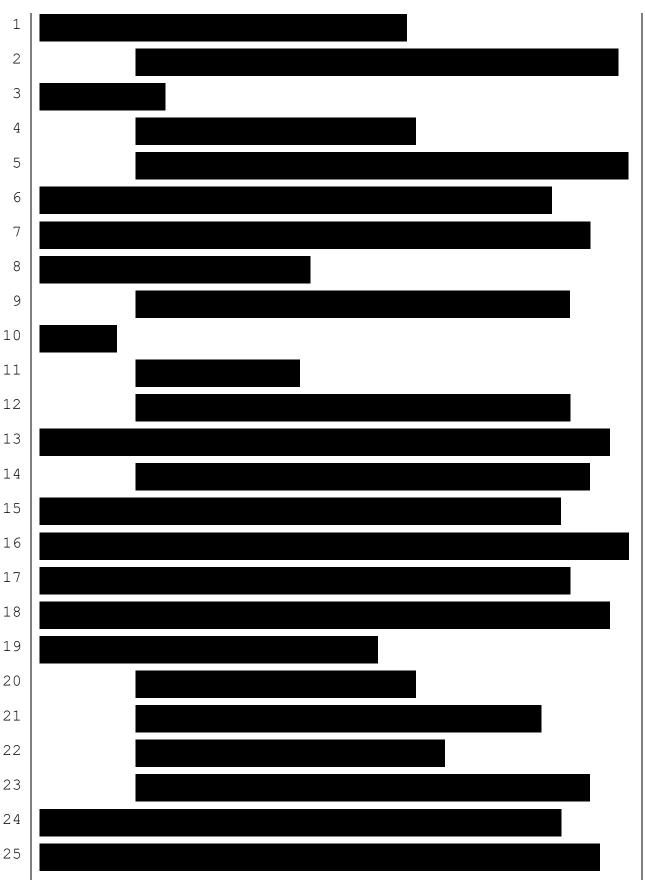
39

1 submissions? 2 MS. SALLSTROM: Your Honor, we --3 THE COURT: Just the submissions. 4 MS. SALLSTROM: Yes, Your Honor. So in this 5 particular instance, we certainly appreciate the time and 6 effort that Court has put into reviewing the parties' 7 submissions, which I know were extensive. 8 9 10 11 12 THE COURT: Have you shown it to your adversary? 13 MS. SALLSTROM: Yes, Your Honor. We advised them 14 of this last week, sent a letter expressing that we intended 15 to raise it with the Court today. 16 THE COURT: Okay. 17 Do you have a copy for the Court? 18 MS. SALLSTROM: Yes, I do, Your Honor. 19 THE COURT: Thanks, Lorraine. 20 Okay. Just for the record, I have before me a 21 multiple-page document -- in fact, it's about half an inch 22 thick -- which is Bates-stamped starting with Rosen 00455600 23 and it goes -- looks like consecutively -- well, counsel will 24 correct me if I am wrong -- it goes consecutively through 25 Bates-stamped page Rosen 00455634, and then there is a

one-page attachment entitled "Certificate of Accuracy" to certify that it's a true translation from Chinese into English. Okay. Proceed. Thank you. MS. SALLSTROM: Thank you, Your Honor. So as Your Honor knows, Satimo Macro Generator is one of the CommScope trade secret software programs at issue in this case. It's been part of the case from the beginning, and since the beginning we've sought discovery into whether Rosenberger had and used it. They have denied for years that they had the program. THE COURT:

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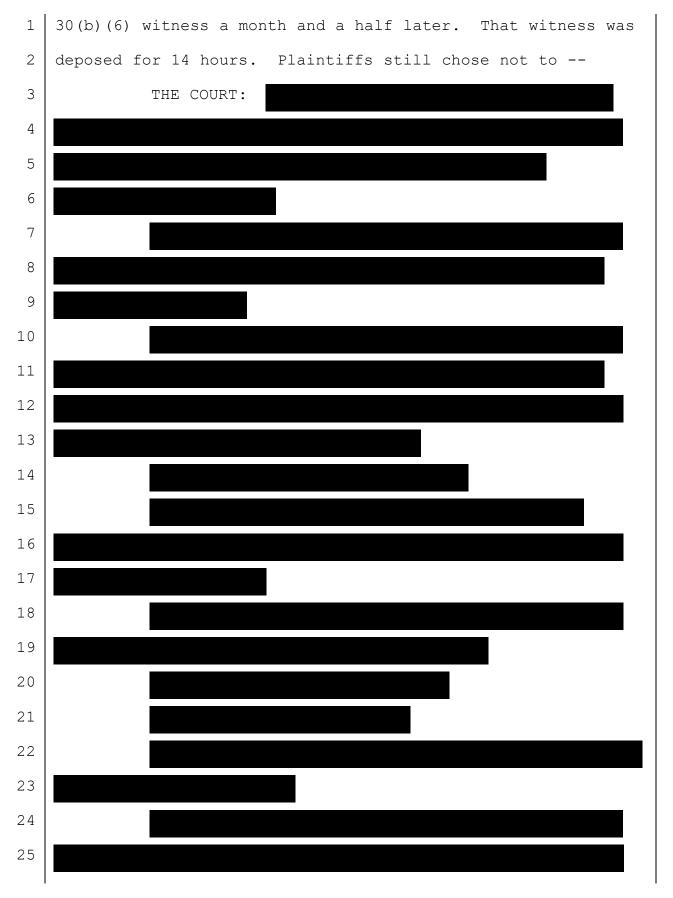
THE COURT: How so? MS. SALLSTROM: Yes. So as you've noticed, it's a certified translation. If you turn to the blue tab, that is the first page of the English portion of the document. THE COURT: Okay. And the Bates number for the record is 455600. MS. SALLSTROM: And so on that page you'll see that I've highlighted some relevant language. So if you could please turn to the red tab. THE COURT: Okay. And for the record, that's Bates-stamped 455613. MS. SALLSTROM: In the middle of the page here, which I've highlighted for your convenience, there's the

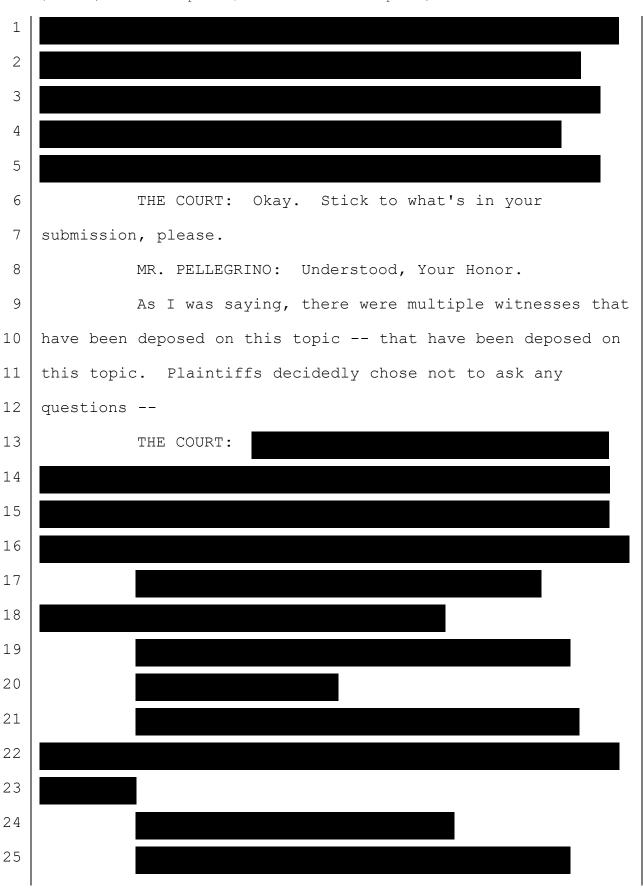
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1
 2
              THE COURT:
                          Okay.
 3
              MS. SALLSTROM: And so if you'll flip through from
 4
    the red tab to the yellow.
 5
              THE COURT: Let me interrupt you.
              Is Rosenberger, based upon this document, still
 6
 7
    declining to produce what CommScope has requested,
   Mr. Filardo?
 8
 9
              MS. SALLSTROM: Your Honor, we --
10
              THE COURT:
                          Just a minute.
11
              MR. PELLEGRINO: Yes, Your Honor.
12
              THE COURT:
                         You're still declining to produce it?
13
              MR. PELLEGRINO: Produce?
                          Produce what they requested about the
14
              THE COURT:
15
16
              MR. PELLEGRINO: The request doesn't actually seek
17
    any documents. It asks for us to produce a witness
18
19
              THE COURT:
                          Right.
                                  And you said there's no
20
    foundation
                                      based upon your witness --
21
    your reinterpretation of his testimony.
22
              MR. PELLEGRINO: Of the witness's testimony.
23
              THE COURT: You're going to continue to resist
2.4
    this?
25
              MR. FILARDO: To produce the witness?
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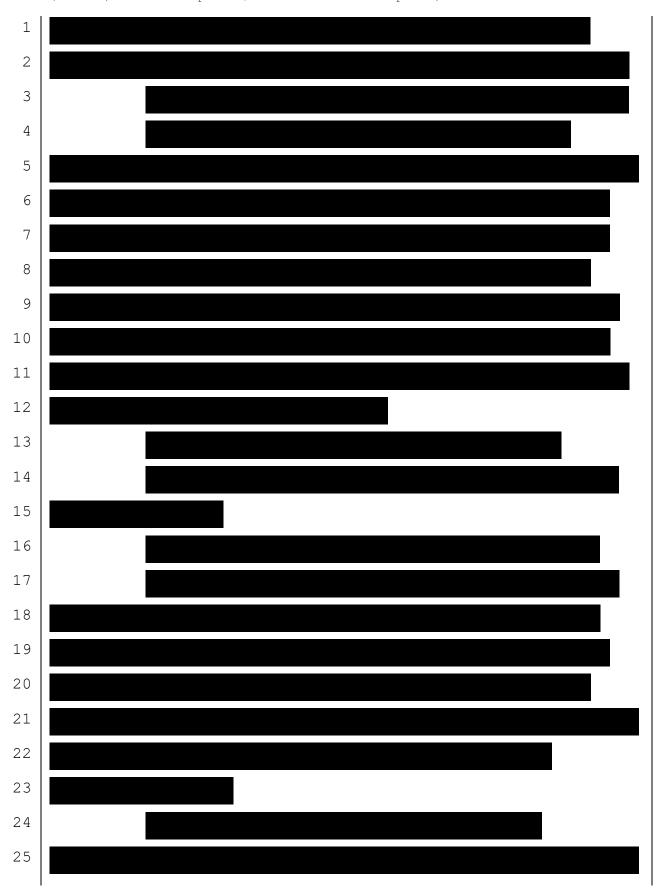
1 Your Honor. 2 THE COURT: All right. 3 Go on. 4 MS. SALLSTROM: So I won't belabor the document, 5 but if you'll flip through from the red tab to the yellow, 6 you'll see that 7 8 9 10 11 12 THE COURT: Okay. You may be seated. Thank you. 13 MR. PELLEGRINO: Good afternoon, Your Honor. Nick 14 Pellegrino from KWM on behalf of defendants. 15 As I just stated, what's been requested here is 16 that defendants be ordered to produce a witness regarding 17 18 This has already been done. Defendants 19 produced a 30(b)(6) witness to testify on this topic. He was 20 deposed over four days for 26 hours of translated testimony. 21 Plaintiffs could have asked all the questions that they 22 wanted, but they decidedly chose not to. They waited until 23 the very end of the deposition after 25 hours and 59 minutes 24 to ask a single question on the topic. 25 Following that, Rosenberger produced a second

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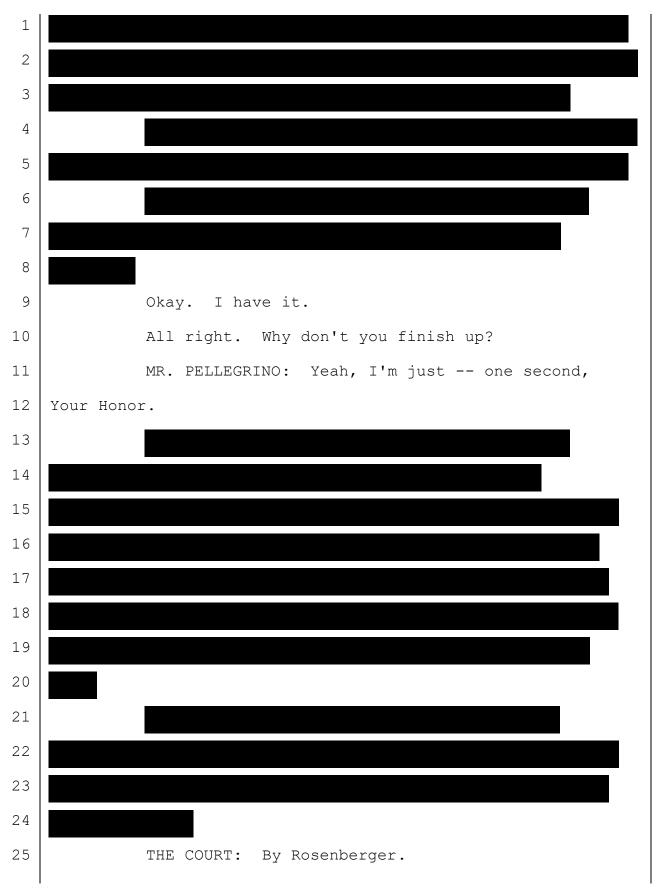
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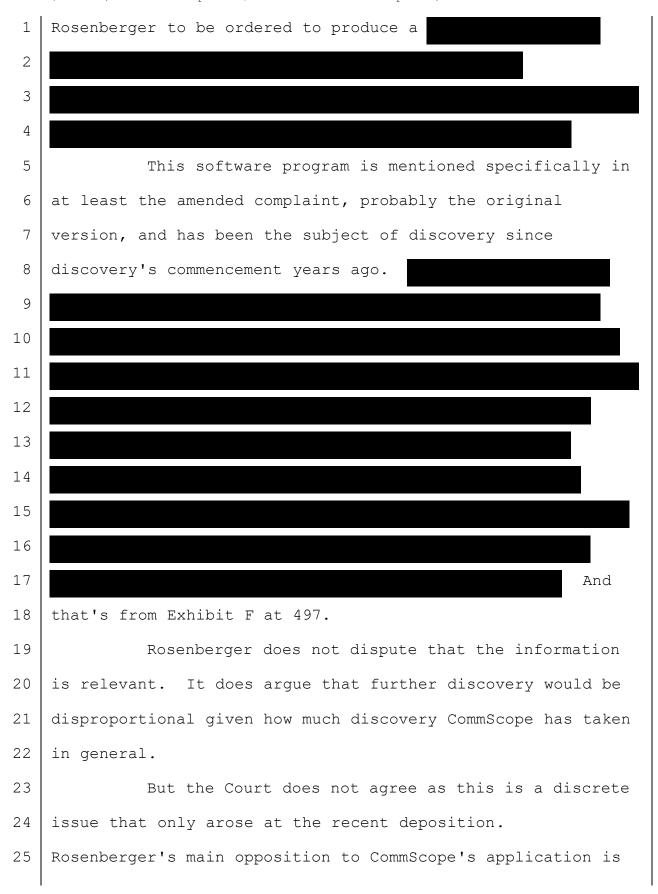
48

1 2 THE COURT: I have the original. 3 Where's the errata? What does the errata say? Is it in the submissions? 4 5 MR. PELLEGRINO: The errata is not because it was 6 submitted after the fact. 7 THE COURT: Okay. MR. PELLEGRINO: After the submission. 8 9 THE COURT: Yeah, I understand. Please read it to What is the recast of the testimony? 10 11 MR. PELLEGRINO: Let me get the declaration. 12 moment, Your Honor. 13 THE COURT: Okay. 14 (Pause in proceedings) 15 THE COURT: Thank you. 16 Okay. I have the errata. I understand. 17 18 19 20 21 22 23 24 25

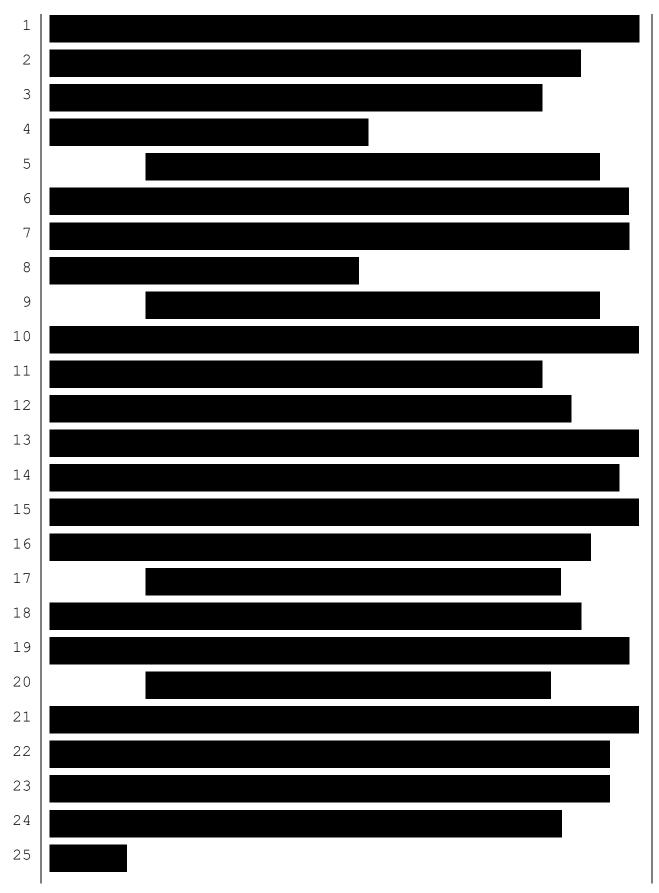
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1	MR. PELLEGRINO: I'm sorry?
2	THE COURT: Produced by Rosenberger.
3	MR. PELLEGRINO: Yes, Your Honor.
4	THE COURT: Okay. Thank you.
5	MR. PELLEGRINO: Thank you.
6	(Pause in proceedings)
7	THE COURT: Go ahead, Ms. Sallstrom.
8	Just keep it brief.
9	MS. SALLSTROM: Yes, Your Honor.
10	
11	
12	
13	
14	
15	
16	
17	
18	
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21	
22	THE COURT: Okay.
23	MS. SALLSTROM: Thank you, Your Honor.
24	THE COURT: Thank you.
25	Okay. On the third issue, CommScope seeks



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              In any event, there is at minimum an ambiguity on a
 2
    relevant issue that needs to be cleared up, and CommScope may
   do so at a further deposition.
 3
 4
              All right. One further thing, and then we're going
 5
    to take a short break.
                            On Issue 4
                            Rosenberger was not objecting to
 6
 7
                            Therefore, I did not spend time
   producing what exists.
 8
   preparing on this issue. It looked like it was in the middle
 9
    of a meet-and-confer. I prepared plenty on everything else.
10
   But I don't do it on things that "may" be in dispute.
11
              So if this landed as a definite dispute, you're
12
    going to have to submit it with where it landed. I am not
13
    going to hear that.
14
              You can give me an update, if you like.
15
              MALE SPEAKER: Who would you like to go first,
    Your Honor?
16
17
              THE COURT:
                          Go ahead, Mr. Washburn.
18
                             Thank you, Your Honor.
              MR. WASHBURN:
19
   briefly, and, again, we appreciate the Court's time.
20
              Again, this is Bryan Washburn on behalf of
21
    CommScope.
22
              To give the Court an update on where we are, we
23
    learned for the first time in 30(b)(6) testimony in Hong
24
   Kong,
25
                                  That information should have
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been produced before depositions. We're now four months removed from that deposition testimony. We obtained on Friday the first production, and much of the information that their 30(b)(6) identified as existing was not produced. We asked where it was. All defendants could tell us is they're still conferring with their client. We think an order directing them to produce the documents related to RFP 111 would -- is necessary, given the amount of time that's passed since the deposition testimony and the information's still not produced. THE COURT: All right. But there's not a dispute as to relevance. I agree that there should be a commitment because we're on -- we're long past fact discovery. But why don't you continue that? If you're not satisfied with their commitments to a date certain, then you can come back to me. MR. WASHBURN: Fair enough. Thank you, Your Honor. THE COURT: Okav. Is there anything Rosenberger wishes to say on that? ATTORNEY FOR DEFENDANTS: Are you asking that we meet and confer with them afterwards to come up with a date certain? THE COURT: Whatever they're seeking. There should be certainty. If you're going to produce it, they should

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1
    know when the end date is. They're trying to plan -- there's
 2
    going to be some re-depositions, and they probably want to
   know before that.
 3
 4
              ATTORNEY FOR DEFENDANTS: Yeah, absolutely,
 5
   Your Honor.
                 We've already produced, I think, over 150 to 200
 6
    documents
 7
 8
 9
                          Okay. I don't need the details.
              THE COURT:
10
              ATTORNEY FOR DEFENDANTS: Understood, Your Honor.
11
              THE COURT:
                         Conclude it.
12
              ATTORNEY FOR DEFENDANTS: Happy to confer with them
13
    on a date certain.
14
              THE COURT: All right. Let's take a 5-minute
15
   break.
            Thank you.
16
         (Recess)
17
              THE COURT OFFICER: You're back on the record,
18
    Judge.
19
              THE COURT: All right. We are continuing with the
20
    CommScope hearing, and we are up to Issue 5, which is
21
    something that Rosenberger is seeking; so they should go
22
    first, please.
23
                         Thank you, Your Honor. I apologize for
              MR. SKLAR:
24
    the lack of jacket. I thought that it was in the car and
25
   didn't want to be late to your hearing.
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1
              THE COURT:
                          Not a problem.
 2
                          So this discovery request goes to the
              MR. SKLAR:
   heart of the dispute; namely, whether CommScope took adequate
 3
 4
   protections to keep its confidential information and trade
 5
    secrets protected; whether their business has been adversely
 6
    impacted; whether their customer relationships have been
 7
    affected; whether competitors now have access to all of their
 8
    alleged confidential information trade secrets; what remedial
 9
   measures have been taken --
10
              THE COURT:
                          Where is the information posted?
11
                          It's been posted on the dark web.
              MR. SKLAR:
12
              THE COURT:
                          Okay. But not on the internet?
13
              MR. SKLAR:
                          No. Oh, well, the dark web is a part
14
    of the internet, but it is on the dark web --
15
              THE COURT:
                          The noncriminal internet.
16
              MR. SKLAR:
                          It's -- correct. It's on the dark web.
17
              THE COURT:
                          Okay.
18
                          But so far we've been stopped from
              MR. SKLAR:
19
    getting any discovery on this.
20
              THE COURT:
                         And do you know whether any of it
21
    concerns BSAs?
22
                          Yes, our understanding is that it does
              MR. SKLAR:
23
    concern BSAs.
                          How do you know that?
24
              THE COURT:
25
              MR. SKLAR:
                          Well, I think that extent of our
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1 investigation is privileged. 2 What I can say is that we did open the first page On the first page, there was a folder called BSA. 3 of it. 4 THE COURT: Okay. 5 MR. SKLAR: While CommScope has tried to stop 6 discovery on the data breach at every turn, we do know that 7 their data was breached, data was taken; 8 9 CommScope's information has been on the dark 10 11 web since at least April. 12 We know that reporters have accessed the data. 13 -- My CommScope 14 customer portal and internal internet were accessed, as well 15 as internal documents, invoices and technical drawings. 16 When we requested CommScope -- when we questioned 17 CommScope on this, they did not provide us any information. 18 19 20 21 They have not updated their interrogatories. 22 They've not produced any documents. They refuse to prepare a 23 30(b)(6) witness --2.4 THE COURT: Let me ask you something. 25 MR. SKLAR: Yes.

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1
              THE COURT:
                          So your primary contention of relevance
 2
    is that the hack would demonstrate that they didn't
 3
    sufficiently protect their internal information such that it
 4
    could qualify as a trade secret?
 5
              MR. SKLAR:
                          Yes, that and then also we believe that
    it's been open to the public and that would -- any trade
 6
 7
    secret status that it had.
 8
                          Okay. And open to the public meaning,
              THE COURT:
 9
    it's been on the dark web?
10
              MR. SKLAR:
                          Yes.
                                 But --
11
              THE COURT:
                          Okay.
12
                          -- by being on the dark web, anyone
              MR. SKLAR:
    with internet access can access it through Tor, which --
13
14
              THE COURT:
                          Well, you have to download Tor; right?
15
                          Sure. Yeah, but it is a free browser
              MR. SKLAR:
16
    similar to Google Chrome or Microsoft Edge.
17
              CommScope did agree to produce the
18
                                      They have since told us that
19
    they will not produce the
20
21
              They also told us they were investigating what
22
    relevant information was reached in the data breach.
23
              They've also told us that they refuse to provide
2.4
   whatever information that is.
25
              We believe it's relevant --
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THE COURT: Now, one thing cited in your arguments on this -- and you quoted -- I think it was the New Jersey Defend Trade Secrets Act. You said that -- oh, let me get the exact quote. MR. SKLAR: I believe we cited on page 40 --Let me finish my thought, please. THE COURT: MR. SKLAR: My apologies. THE COURT: Okay. In Rosenberger's portion of the joint letter at ECF 566, pages 42 to 43, citing the New Jersey Trade Secrets Act, 56:15-2, Rosenberger pointed out that a trade secret may lose such protection when its value derives in part from not being generally known to and not being readily ascertainable by proper means by other persons. Do you contend that the hack was obtained -constitutes obtaining the information from CommScope by proper means? No, I don't think that the hack itself MR. SKLAR: obtained anything by proper means. But I do think that it's open on the internet that anyone can access. And that --And it was made available by a criminal THE COURT: act. That is true, but we also cited case MR. SKLAR: law that says however it became made available, once it's on the internet and now it does become public.

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1 THE COURT: Okay. 2 Further, we do believe that has gone to MR. SKLAR: 3 damages because 4 We know that CommScope's My 5 CommScope portal was opened and accessed and breached. 6 internet was breached. Invoices, technical drawings were put 7 onto the dark web. 8 We have cited secondary --9 THE COURT: That's a lot of information from the 10 first page. 11 No, it says that in the articles that MR. SKLAR: 12 we cited. 13 THE COURT: Oh. 14 MR. SKLAR: Yeah. -- yeah, and I brought those 15 articles with me. Multiple different reporters have said 16 It's in multiple articles that we have given to you. 17 18 19 20 21 22 They've said that pretty much all of their damages 23 are now related -- all their damages -- all their business 24 troubles in the BSA industry is because of our clients. And 25 this would show that it's not, that there are other factors.

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1 And it's important for our experts to see this. It's 2 important for our experts to see the to see 3 how these hackers actually got into the system, whether --4 our security experts told us that's actually very important 5 for them to see. And we've also provided articles which show that 6 7 the data breach affected CommScope's EBITDA by almost \$2 8 million last year. And we're not sure how much it affected 9 it so far. 10 While they have said that the information is 11 privileged, they refuse to identify the company 12 13 14 15 16 17 18 And at the end -- we have offered to review the 19 20 data. We have been threatened with ethical and criminal 21 allegations against us if we were to review the data. 22 think that the information is public since anyone can access 23 There is no argument that the data would be purloined if 24 we did that. 25

62

1 The burden is too high. 2 3 4 And we need to know that for our 5 defenses. Okay. I understand. 6 THE COURT: 7 MR. SKLAR: Thank you. 8 MR. KAHNKE: So, Your Honor, I know you're well 9 familiar. Mr. Kahnke, I know who you are, but 10 THE COURT: 11 just state it for the record. 12 MR. KAHNKE: Thank you, Your Honor. I'm Randy 13 Kahnke from Faegre Drinker on behalf of CommScope. 14 You know from your years of involvement with this 15 case, that we now have compelling evidence that Rosenberger 16 has our trade secrets, both hardware and software, and we have more evidence that they've used them. That's what we 17 18 know in this case. That's the context. 19 And now, against all of that, we have Rosenberger 20 saying, "Okay. We're going to try to look at this other 21 issue, where you were subject to a criminal hack by a Russian 22 criminal enterprise. And we are going to try to use that to 23 somehow undermine what's been done in this case." That's 24 what's going on. I would suggest to you that it is a classic "blame the victim" situation. 25

These hacks happen all the time. Just last week, "The Times" reported --THE COURT: Microsoft. MR. KAHNKE: Bingo. The largest company in the world by market cap, one of the most sophisticated companies in this industry, the electronics service industry, their senior executives' emails attacked. And who did it? Russians did it. Right? So what is this -- what is this relevant to?

64

1 THE COURT: You waived privilege by producing it to 2 the adversary. 3 MR. KAHNKE: Correct. You waive privilege with 4 respect to that piece. It's not a subject matter --5 THE COURT: The four corners of what was produced. MR. KAHNKE: You know that. 6 7 They say beyond that, that this information is 8 somehow relevant, that this breach is somehow relevant to 9 what's going on in this case. It's legally irrelevant. 10 put your finger on it: With proper means. 11 If -- they want to say that the information is in 12 the public domain -- it's not. It is not on the public 13 internet. It is on the dark web. It is the playground of 14 criminals. That is what the FBI recognizes. That's what the 15 United States cybersecurity says. Don't go there. 16 Everybody knows that that information is what it It's criminal information. It's called the "dark web" 17 18 for a good reason. 19 It is not there as a result of proper means. 20 if it's not there as a result of proper means, it does not 21 erode the trade secret protection. It's not the public 22 internet. 23 It also -- and Your Honor will know this -- it also 24 is not relevant to their claims in this case about how the

information was misappropriated, our claims about how the

In order for this 1 information was misappropriated. 2 information to be relevant, there has to be a correspondence, a relationship between the manner in which this information 3 4 was, even by their account, made public -- okay? -- a data 5 breach and the misappropriation. We have no correspondence 6 or relationship between those two. There's a data breach. 7 And that has nothing to do -- see, the first issue that 8 you've already talked about here today in your ruling. 9 have former employees who took this information and took it 10 over to Rosenberger where they used it. It has nothing to do 11 with the data breach. That happened years ago. 12 breach just happened last March. There's no correspondence 13 there. And the law is clear that if there's no 14 correspondence, there's no relevance. 15 Beyond that, they say it's relevant to reasonable 16 They have had extensive discovery over the course 17 of years and over the course of many hours and many witnesses 18 of deposition testimony about the efforts that CommScope 19 takes to protect the confidentiality of its trade secrets. 20 They have that information. They already know that 21 information. They know what has -- what CommScope does. 22 They're going to make the arguments that they will make about 23 that. 24 They cannot cite a single case -- and I just want 25 to be real clear about what the cases are that have been

cited here. They have not cited -- I don't believe they can cite a single case that says what happens in some satellite data breach litigation or data breach situation is relevant to what's going on in this case regarding trade secrecy. There's not a single case that they cite on it. And I don't believe that there's a single case available.

And I think it makes good sense that there are no cases because these breaches are ubiquitous, as Your Honor knows. And if we go down that path where we're saying that a data breach is somehow relevant to a trade secret case, we are going to have a case within a case -- every time you've got a trade secret case and you've got a data breach, you're going to have a case within a case.

In this case,

Not a single case that they can cite that says that, that it's relevant. And I think for good reason.

Similarly, not a single case that they can cite that says if you put information on the dark web, not the public internet where you can get it with a Google search, but on the criminal playground, if you put information there when the information is obtained by improper means -- and, man, if there's anything that's improper means, a criminal hack certainly is -- there's not a single case they can cite that says that's relevant to the erosion of trade secrecy.

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   Not one.
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              That leaves us to their, I quess, final proposal,
   which is that counsel themselves should be allowed to review
 3
 4
    this information. I'm respectful of the questions Your Honor
 5
    asked of counsel because you, at least, got a bit of an
 6
    answer. We got nothing.
 7
              We're very concerned about it. We're very
 8
    concerned about what's happened here. You understand the
 9
    ethical rules.
                    We know that. They've asked for permission
10
    to review this information. And I think that's very telling.
11
              If this information was available on the internet,
12
    available through a Google search, there would be no request.
13
    They're aware of that. It's an inappropriate thing to do,
14
    and the ethics rules are clear on it.
15
              I'll stop there unless Your Honor has questions.
16
              THE COURT: I don't. Thank you.
17
              MR. KAHNKE:
                           Thank you.
18
              THE COURT:
                          Okay.
              On this issue, which I've labeled Issue 5 -- did
19
20
    you want to say something else?
21
                         Yeah, I just had, like, two or three
              MR. SKLAR:
22
    quick --
23
              THE COURT:
                          Sure.
                                 Come on up.
24
              MR. SKLAR:
                          Thank you very much.
25
              THE COURT:
                         And just for the reporter, say your
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1 name again when you come to the podium. 2 MR. SKLAR: Thank you. Andrew Sklar from King Wood Mallesons on behalf of defendants. 3 4 THE COURT: Oh, he's not the court reporter. The 5 court reporter is the recording. Understood. Thank you. 6 MR. SKLAR: 7 That's my law clerk. THE COURT: 8 MR. SKLAR: Sorry. 9 So, first, when he was talking about privilege, I 10 just want to point out that under Federal 11 Rule 26(b)(3)(A)(2), if the information is not accessible 12 through any other means, then the work product privilege 13 would not apply. 14 And for just standard privileges to apply, then it 15 would have had to have been made primary -- for the primary 16 purpose of litigation. 17 There are news -- they have put out statements in 18 news articles saying that this was made to see what data was 19 leaked, to do a full investigation on it. They have never 20 mentioned any litigation. First time was to us. We didn't 21 know who the attorneys were for that. 22 23 24 In all the cases they cited, there was a two-tier 25 investigation. So there was one investigation for the legal

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There was another investigation showing for -- for the company itself. And in those cases, the legal team's investigation was privileged, but the rest of the information and the rest of the investigation was not privileged. Second, I know he said that we asked for We did not -- for permission. We asked if they permission. objected to it because they hinted that they would do something. And because they threatened us with ethical and criminal sanctions with this, we, obviously, wanted to go to the Court first. Next, he kept pointing out that we pointed out no cases for a data breach. And what we have pointed out are multiple cases where information could be posted online, had been posted in news groups and posted in groups online, small areas of the internet with less than the millions of people who view the information on the dark web. I don't think it matters if it was from a data breach or if it was from the He was saying we have no cases that say that this dark web. There are no cases going the other way either. is a leak. This is a novel issue. Wrap it up. THE COURT: MR. SKLAR: Yeah, I'm sorry. Lastly, I just want to point out that CommScope's own website does point out that a business will lose its

reputation. We cited that in our papers. And that could

|SEALED (available for parties; NOT available for the public) 1 take years to come back. And so I think that supports our 2 damages arguments. And I also would just, at the very least, like a 3 4 commitment for them to produce the executive summary because 5 they did tell us they would be producing that. They agreed They said in their papers. 6 7 THE COURT: They offered it to you. You declined; 8 right? 9 MR. SKLAR: Thank you. 10 THE COURT: Have a seat. Rosenberger seeks 11 information on a data breach of CommScope perpetrated by 12 criminal hackers from Russia. Apparently, the hackers posted 13 information they obtained on the dark web. 14 The Court finds Rosenberger's request is neither 15 sufficiently relevant nor proportional to this action to 16 order the requested discovery. In briefing this issue, the 17 parties seem to have lost sight of the forest for the trees. 18 The forest, as this Court sees it, is as follows. 19 CommScope was the victim of a crime committed by 20 hackers, seemingly very sophisticated ones and possibly 21 state-sponsored actors. CommScope is not alone. Legions of 22 parties who responsibly protect their confidential 23 information -- hospitals, police stations, even the federal courts through the SolarWinds breach, and last week even 24

Microsoft -- have similarly been victims of criminal hacking.

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Therefore, the Court does not start with the presumption, as Rosenberger urges, that CommScope, having been victim of a data breach, necessarily failed to take adequate security measures to qualify its proprietary information in BSAs as trade secrets. The question before the Court is whether the recent hack of CommScope is relevant to whether CommScope sufficiently protected its internal information for it to qualify for trade secret protection. A trade secret is entitled to legal protection when its owners have taken reasonable measures to maintain its secrecy. See Oakwood Laboratories LLC v. Thanoo, 999 F.3d 892 at page 905, a Third Circuit decision from 2021. However, it may lose such protection, as Rosenberger points out, when its value derives in part "from not being generally known to and not readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." See Rosenberger's portion of the Joint Letter at 566, pages 42 to 43, citing New Jersey Trade Secret Act 56:15-2. There is no question that "proper means" were not used to ascertain CommScope's information by the criminal Proper means do not include criminal acts. Therefore, the fact that CommScope was the victim of a

criminal hack is not relevant to the issues of whether

1 CommScope's design files are entitled to trade secret status 2 under New Jersey law. Compare Hurry Family Revocable Trust 3 v. Frankel, 2023 WL 23805 at *8, a Middle District of Florida 4 decision from January 3, 2023, which parenthetically states 5 "intentional publication of material will destroy its trade 6 secret status." See also Merckle GmbH v. Johnson & Johnson, 7 961 F. Supp. 721 at page 731, a District of New Jersey 8 decision from 1997. And, parenthetically, that case states, 9 "A substantial element of secrecy must exist so that, except by the use of improper means, there would be difficulty in 10 11 acquiring the information." And that's further quoting the 12 Restatement of Torts. 13 Moreover, the fact that portions of CommScope's 14 information allegedly have now been made public through 15 criminal activity does not waive its right wholesale to trade secret protection, as Rosenberger argues. 16 parenthetically, I will say that I do not consider 17 18 publication on the dark web as being made public, given the 19 additional and warned-against steps needed to access the dark 20 web. 21 In any event, inadvertent revelations of 22 confidential information does not waive its protected status. 23 Instead, the information loses its protection only if it is 24 made "generally known to the relevant people, typically meaning competitors." Syncsort Inc. v. Innovative Routines, 25

2011 WL 3651331 at *14, a District of New Jersey decision from August 18, 2011.

Rosenberger has not introduced sufficient evidence that the evidence posted on the dark web has become "widely available" information as to obviate trade secret protection or evidence that "competitors or unauthorized persons accessed or even attempted to access the information," such as to deprive the information of its economic value. See id. at *15.

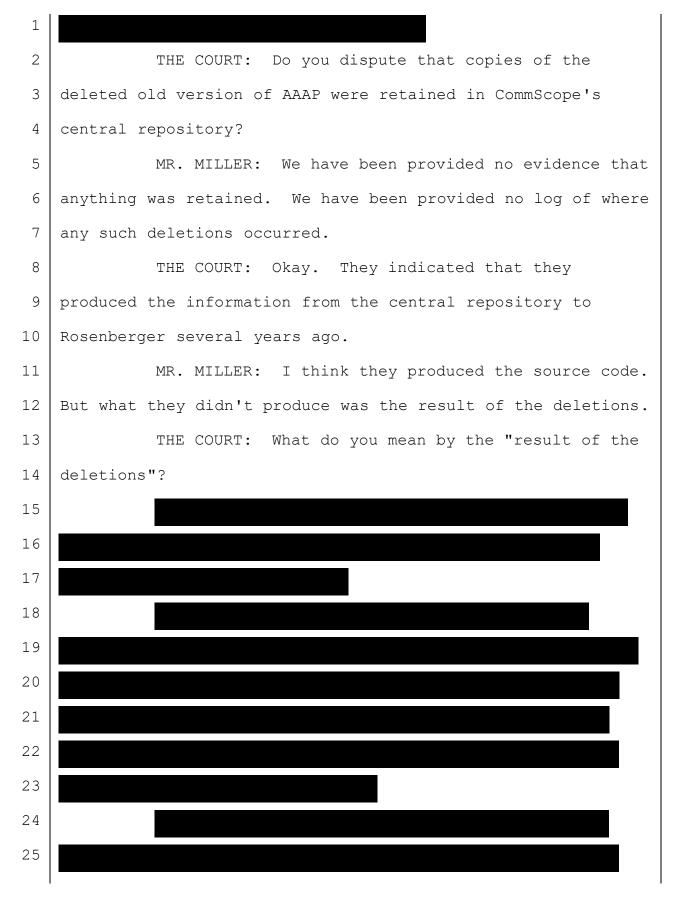
Therefore, the Court finds the 2023 data breach is not sufficiently relevant to the issues present in this case.

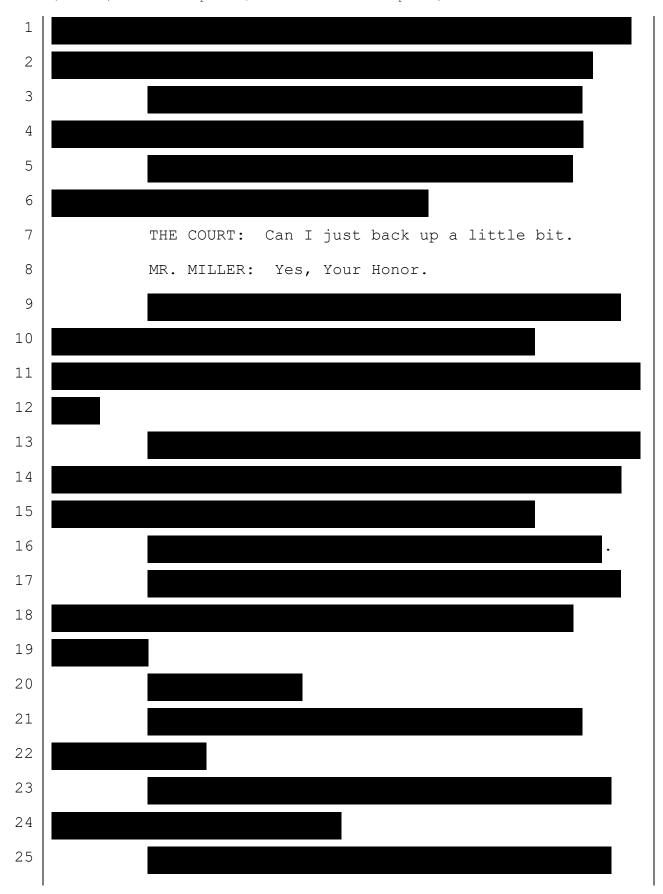
Furthermore, the time period of the hack, in March of 2023, also underscores its lack of relevance to this case. Whatever security procedures were in place in 2023 at the time of the recent data breach may well have been quite different from those in place prior to 2019, which is the time period at issue in this action.

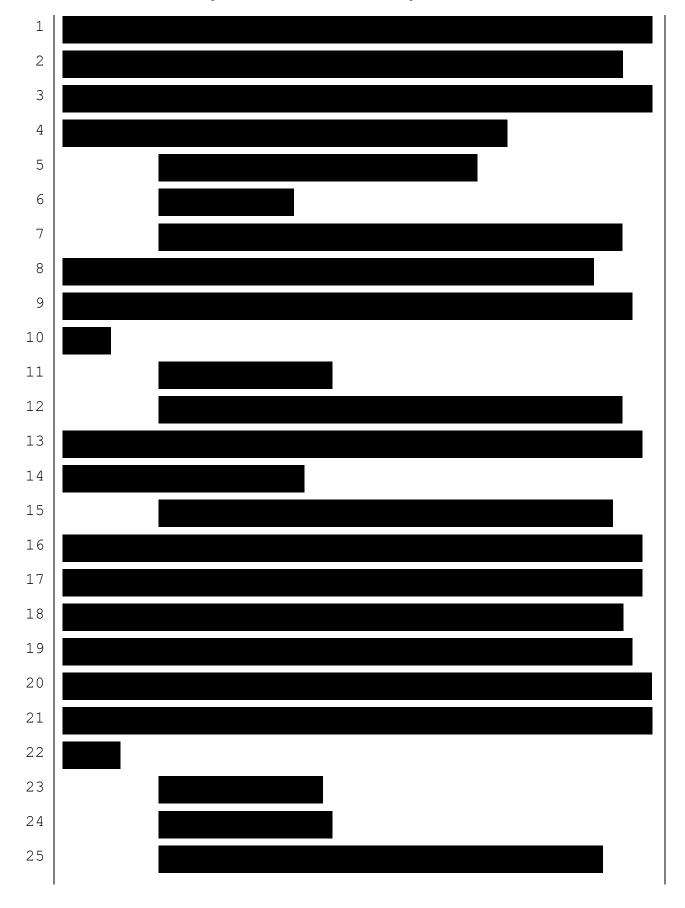
Nor is the information sought by Rosenberger here proportional, even if it had some tangential relevance, assuming arguendo. Rosenberger seeks broad discovery into the hack. But Rosenberger has had years to discover CommScope's means of protecting its alleged trade secrets, a key and obvious element in determining whether or not a trade secret exists. See Merckle GmbH v. Johnson & Johnson, 961 F. Supp. 721 at page 731, a District of New Jersey decision from

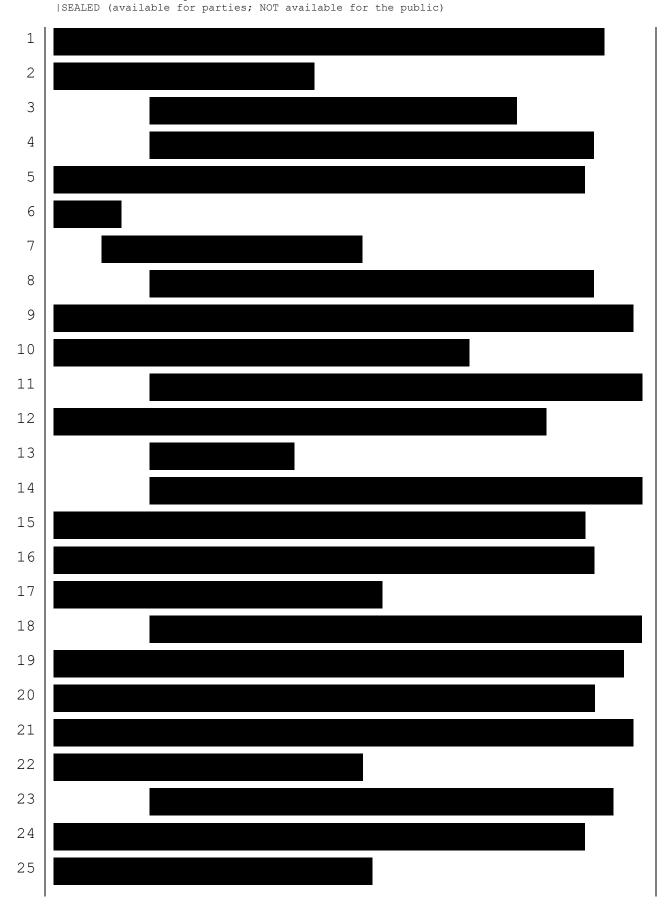
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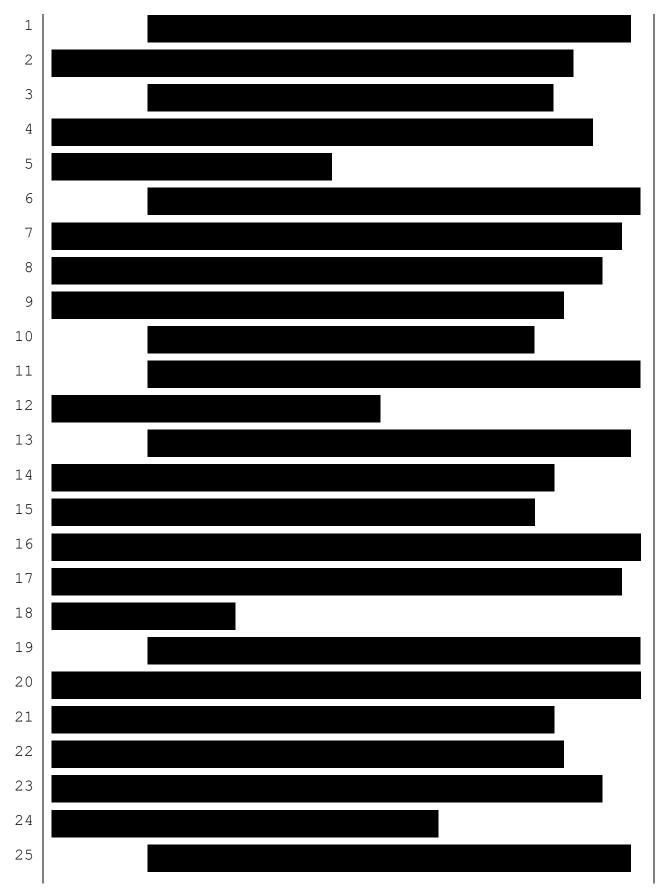
1 1997. 2 Accordingly, the relevant information as to what 3 steps CommScope took to protect its trade secrets has been 4 discoverable since the commencement of discovery in this 5 long-pending litigation. It cannot reasonably be considered 6 to have emerged only after CommScope was hacked in 2023. 7 This, again, suggests that Rosenberger's request is 8 not proportional. Rosenberger's request for this Court to 9 compel any information concerning the criminal hack of 10 CommScope is denied. 11 Issue 6. 12 Your name again, sir? MR. MILLER: Dan Miller, from King Wood & Mallesons 13 14 on behalf of defendants. 15 So this is a -- it's a simple issue, and it's a 16 small issue. I think it's a really discrete issue. 17 18 19 20 21 22 23 24 25





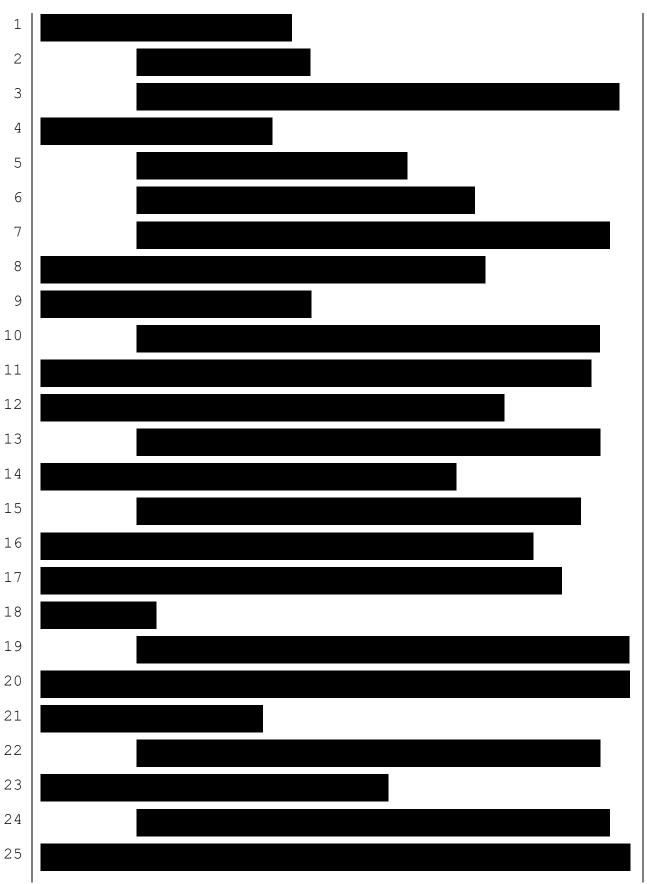






|Hearing |19-cv-15962, January 25, 2024

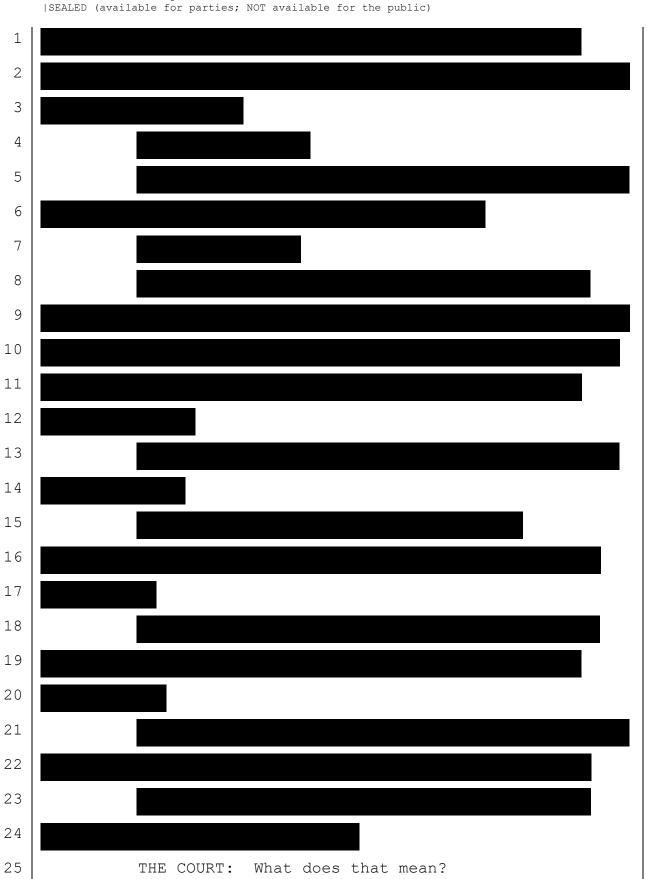
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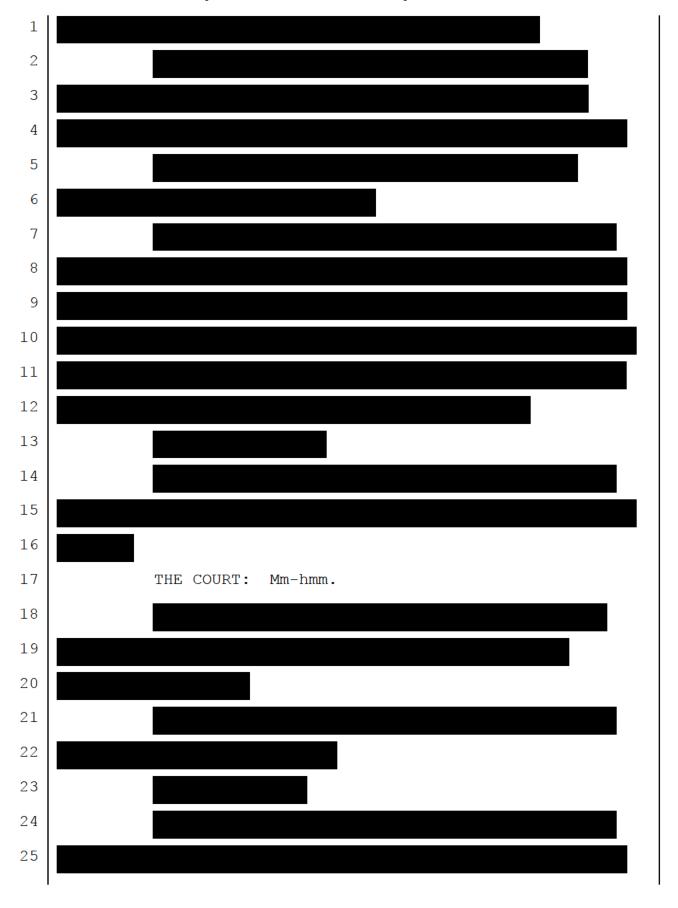
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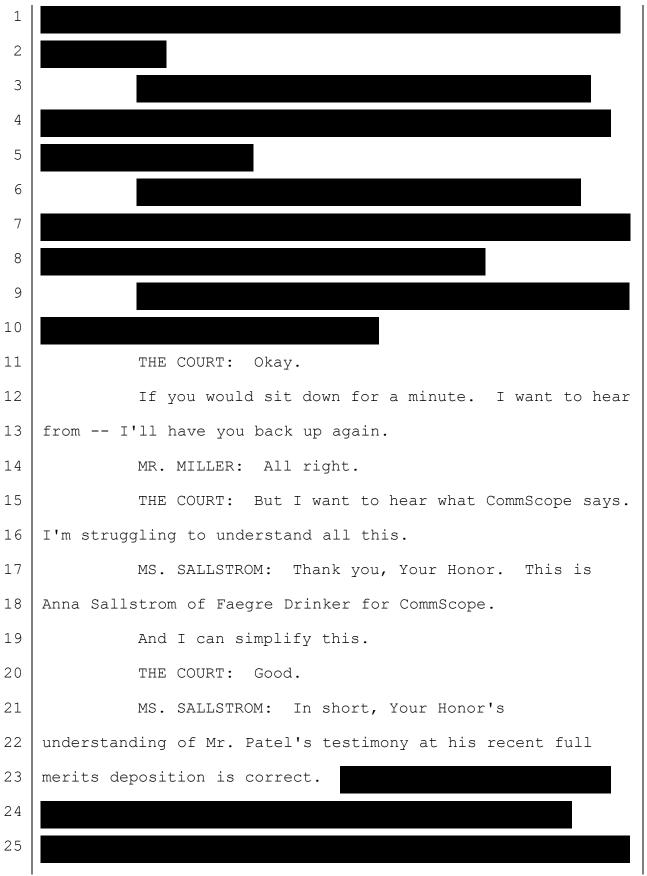


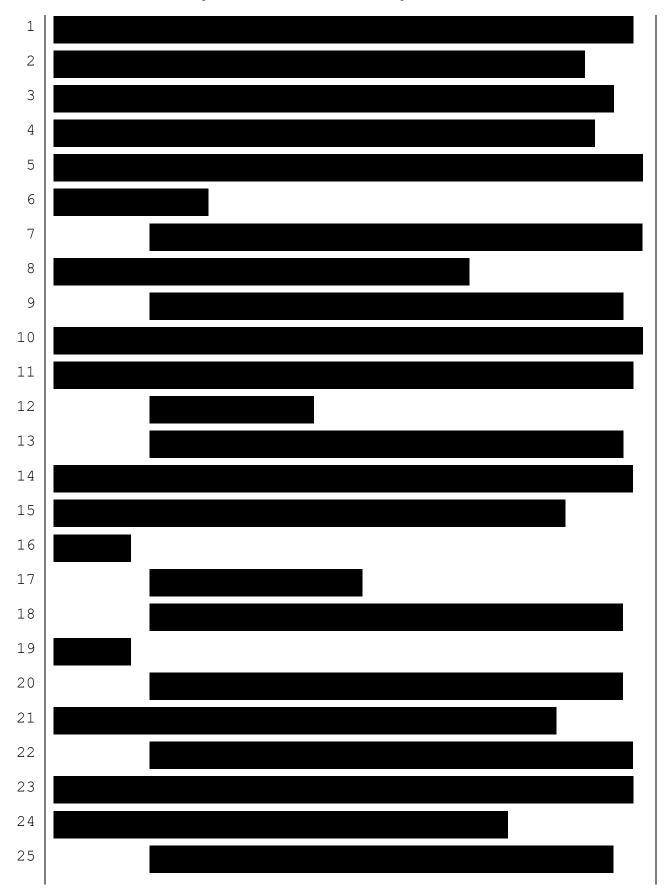
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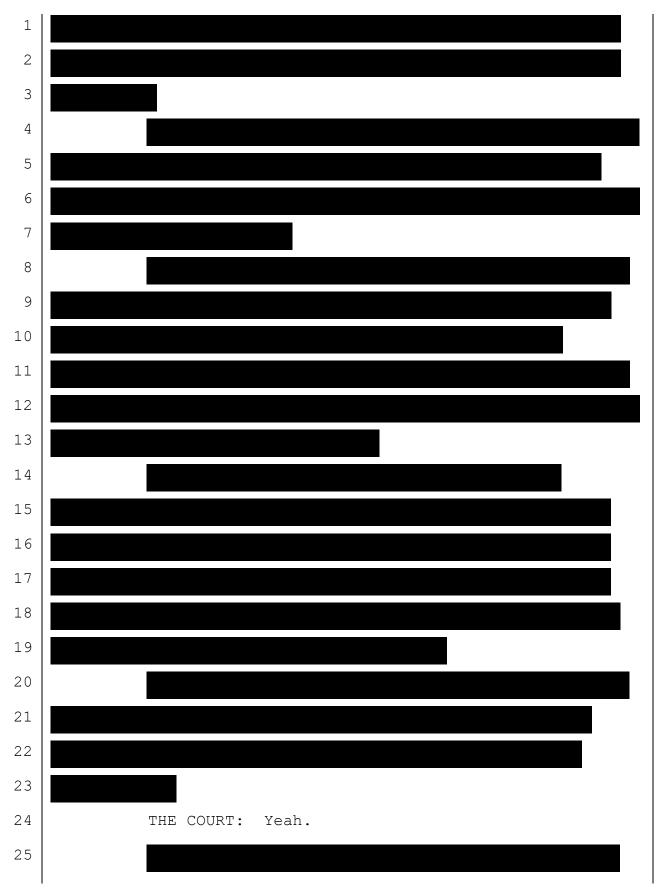
1 MR. MILLER: It's like a --2 THE COURT: It helps you design --3 MR. MILLER: No. It's a software module; right? 4 THE COURT: Okay. 5 MR. MILLER: You can take this -- you can take this 6 executable, I could email someone, they can run it. could put it anywhere. This thing could exist --7 8 THE COURT: Okay. 9 MR. MILLER: Right? It's not the -- it's not the source code itself. It's the executable version. 10 11 the -- like, Word; right? 12 THE COURT: Okay. 13 MR. MILLER: Right? And you send a copy of Word, 14 and somebody now is running Word over there. You know, it's 15 a little more complicated, but it's the same thing. 16 THE COURT: Okay. I understand. 17 18 19 20 21 22 23 24 25

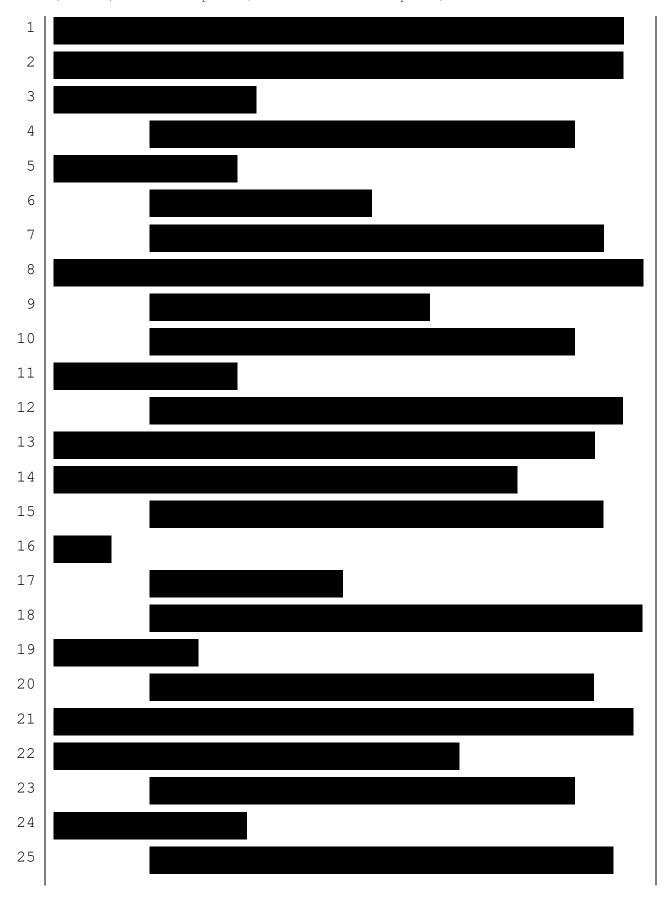


|19-cv-15962, January 25, 2024

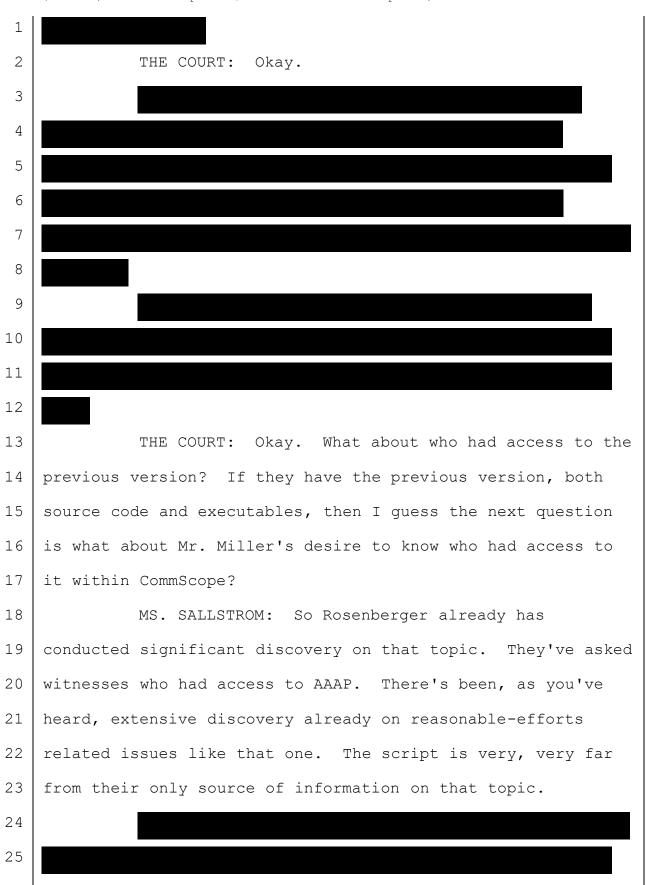








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1 2 3 4 5 THE COURT: What's the harm of producing the 6 script? 7 MS. SALLSTROM: Right. 8 So the first point is really a practical one. 9 is far too late; right? So one harm to CommScope is simply 10 that we know that counsel for Rosenberger --11 THE COURT: This whole case is far too late. 12 But what's the prejudice? 13 MS. SALLSTROM: So there's a lot of water under the 14 bridge; right? This case has been going for a long time. 15 Depositions were conducted on this topic in January 2020. 16 They knew about the script then. We briefed these issues in 17 our PI motion -- right? -- and CommScope's motion for a 18 preliminary injunction. They never asked for it. 19 Rosenberger's prior counsel, Milbank had every 20 opportunity to send us -- to submit a discovery request --21 right? -- in full merits discovery asking for the script, 22 which we know they knew about. And they didn't. 23 Instead, they made a strategic decision to rely on 24 the extensive other information available to them on these 25 topics -- much of which -- on this topic, much of which I've

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    just run through.
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              And at this point we're -- in fact, counsel for
   Rosenberger didn't reraise the PowerShell script with us
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 4
    until Mr. Patel's deposition, which took place six months
 5
    after the close of written discovery. And there, as we've
 6
    discussed, they learned nothing new. There's just simply no
 7
    good cause here.
 8
              And that's our primary argument.
 9
              THE COURT:
                          Okay.
                                 Thank you.
10
              MS. SALLSTROM:
                             Thank you, Your Honor.
11
              THE COURT:
                         All right.
12
              I really want to resolve -- oh, go ahead.
13
    Yeah.
14
              MR. MILLER: Just a couple of --
15
              THE COURT: I promised you and ...
              MR. MILLER: You did. I feel like ...
16
17
              All right. Dan Miller again, KWM.
18
              I think what's telling, what you didn't hear is
19
    CommScope never said it's not relevant. And it is relevant
20
   because it goes to key points of how it was kept and
21
   maintained. They said we could have asked for it. I would
22
    say that they always had a duty to produce it and disclose
23
    it.
24
              THE COURT:
                         But Rosenberger [verbatim], clearly the
25
   record shows that the PowerShell script was mentioned years
```

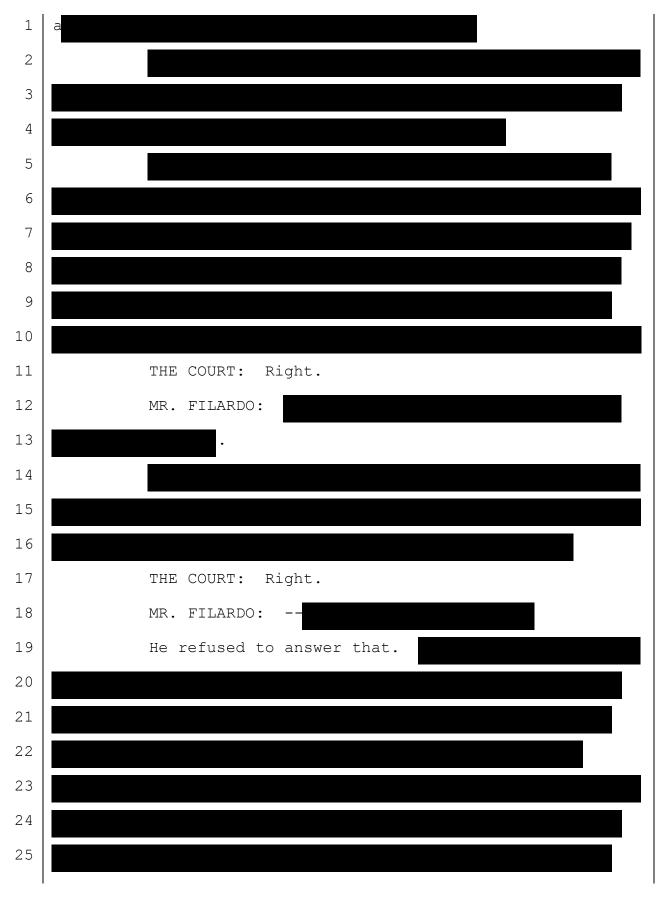
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    ago.
 2
              MR. MILLER: Sure, it was known.
 3
              THE COURT: And if it was, why didn't you waive the
 4
    right to seek it and -- well --
 5
              MR. MILLER: Because --
 6
              THE COURT: -- while discovery was open?
 7
              MR. MILLER: Because the testimony was consistent.
 8
 9
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              They haven't said it's onerous.
21
              THE COURT: And there's no spoliation because it
22
    didn't disappear. It has to be irretrievably lost or
23
    altered. So to the extent there are shades of spoliation
24
    here, it's not -- that dog won't hunt.
25
              MR. MILLER: Well, if -- we would know from the
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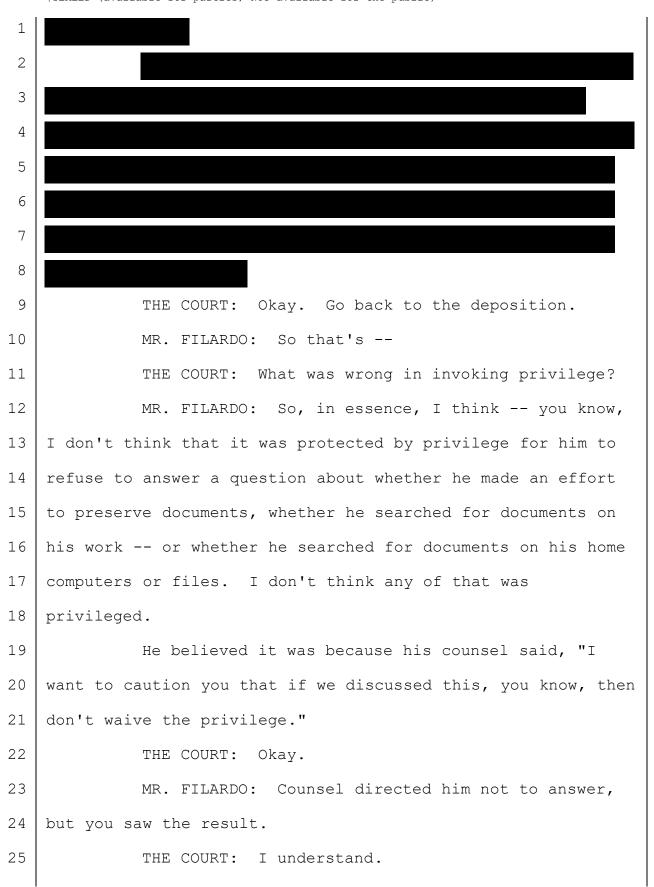
```
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    PowerShell script -- also they --
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                         But you don't dispute that you have not
              THE COURT:
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    only the source code but executables for the previous version
 6
    of AAAP.
 7
              MR. MILLER: But that doesn't tell me --
 8
              THE COURT:
                         Do you dispute that?
 9
              MR. MILLER:
                          I do not.
              But that doesn't tell me where it was.
10
11
              THE COURT: Okay. So that's the one piece that's
12
   missing.
13
              But I thought that's what you also said the
14
    PowerShell script won't tell you.
15
              MR. MILLER: It will tell me where they looked for
16
    deletions. It will also tell me whether they created a log
17
    file at the time. I don't know if they created a log file of
18
                If they did, they haven't produced it.
    deletions.
19
    PowerShell --
20
              THE COURT: That's not --
21
         (Simultaneous conversation)
22
              MR. MILLER: -- if the PowerShell script says that
23
    they did because you would pipe it to a file if you --
              THE COURT:
24
                         I see.
25
              MR. MILLER: -- get the list.
```

1 I don't know. They haven't produced it. 2 don't -- what they can't do is cherry-pick the evidence. 3 They can't now just want to rely on Mr. Patel's deposition 4 testimony when we could determine whether that's true or not 5 based simply on this one file. Okay. This is what I'd like to do. 6 THE COURT: 7 You know I am not a punter; right? I may adjourn hearings, 8 but when I get to them, I want to settle all family business 9 and be done with it. 10 But this is one issue -- I really didn't grasp it 11 in the briefing. I didn't get from Rosenberger's arguments 12 what was relevant. I understand better now at oral argument. 13 But I want you to make one more effort to resolve 14 And, it not, then one short submission, joint 15 submission, and drill down on what Rosenberger is seeking here that it contends is relevant and that hasn't been 16 17 answered by the previous productions or discovery. Okay? 18 MR. MILLER: Yes, Your Honor. 19 THE COURT: And then why what you seek you believe 20 will show that; you can't know but why you have grounds to 21 believe that. And then let CommScope see it. And I'll -- I 22 promise I won't delay you long in deciding it. 23 reserve on this issue. Thank you. 24 MR. MILLER: Thank you, Your Honor. 25 THE COURT: Okay. All right.

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1 Let's go -- I think we're on the final issue. 2 Issue 7 concerning the deposition of Mr. Bisiules, if I'm pronouncing that correctly. 3 4 MR. FILARDO: Yes, good afternoon, Your Honor. 5 Vincent Filardo again. 6 This is a -- sort of a related issue because it 7 arose out of the same set of facts. And I want to refer the 8 Court to Exhibit JJ, which is the relevant portions of the 9 transcript of Mr. Bisiules's disposition. 10 THE COURT: Yeah, I read it. 11 MR. FILARDO: 12 13 14 15 THE COURT: Enabled people to misappropriate their 16 stuff. 17 MR. FILARDO: Yeah, exactly. They were able to 18 now --19 THE COURT: It's not that nefarious. 20 MR. FILARDO: 21 22 23 24 25





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1 MR. FILARDO: And that's it. That's the point that 2 I wanted to make, and I think that's what the deposition 3 transcript shows. 4 THE COURT: Thank you. 5 MS. MAPPES: Thank you, Your Honor. Harmony 6 Mappes, again for CommScope. I will be quick. I have three 7 points. 8 THE COURT: Okay. 9 Number one, counsel followed a very MS. MAPPES: 10 standard practice in giving a cautionary note not to reveal 11 privileged information. 12 THE COURT: Right. 13 MS. MAPPES: Not only is it standard, Rosenberger 14 gave this exact same quidance to many of its witnesses 15 throughout those depositions. 16 Point number two, counsel did not instruct 17 Mr. Bisiules not to answer the questions. Mr. Bisiules 18 answered the questions to the best of his ability, including 19 specifically saying he did not destroy any documents. 20 Point number three, on these facts, Rosenberger has 21 not established good cause to reopen the deposition or to 22 compel a declaration. If good cause exists to reopen here 23 based on that sort of cautionary instruction, then good cause 24 would exist practical in all cases, including other 25

depositions in this case. Instead of --

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THE COURT: I was going to ask counsel why they didn't call me from the deposition. I don't think it was in Hong Kong. He's a U.S.-side witness. Right? MS. MAPPES: It was a U.S.-side witness, Your Honor, and instead of trying to work out is there some discrepancy here about what the witness is understanding, the deposition was adjourned, and there was no further effort made or no further questions asked to try to sort this out. Mr. Bisiules was not instructed not to answer the question. There's no -- I mean, counsel's argument relies on There's no evidence of that here, and they have not met the good cause standard to reopen the deposition. THE COURT: Okay. MS. MAPPES: Thank you, Your Honor. I don't think you need to say anything. THE COURT: All right. In the final issue presented by the parties, Rosenberger seeks a declaration or additional deposition testimony from CommScope's director of BSA engineering, Pete Bisiules, on the ground that he improperly refused to answer certain questions at deposition. The Court has reviewed the deposition transcript at There were only a few questions the witness refused to answer on privilege grounds without an instruction from his attorney not to answer the question. What should have happened is the witness should

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question.

|SEALED (available for parties; NOT available for the public) have conferred with his counsel about whether the information sought was privileged -- it's one of the few exceptions that you can confer when sworn with your counsel privately -- and the attorney should have given the witness an instruction about whether he could answer the question or not or parts of it and made a record of the private conference and its See Hall v. Clifton Precision, 150 F.R.D. 525 at outcome. 529 to 530, an Eastern District of Pennsylvania decision from 1993. But instead, it seems the layperson witness struggled to decide himself whether the information sought was privileged. The Court will make rulings now on the only questions the witness declined to answer in the deposition excerpt provided to the Court. First, Mr. Bisiules self-invoked privilege in declining to answer whether he and others at CommScope "made a concerted effort to preserve documents and records as a result of this litigation." And that's from Exhibit JJ at pages 240 to 241. There was a form and foundation objection and a direction not to reveal the content of discussions with counsel. And then the witness said he could not answer the

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The Court finds he ought to have answered the question about whether he personally made efforts to preserve documents and records. But there was no foundation to establish whether he was familiar with what others at CommScope did, and he testified in 30(b)(1) and not a 30(b)(6) capacity, so he need not have answered that portion of the question about what others did. But there is no privilege as to whether he preserved documents and records because it simply involves his testifying as to his own actions and matters within his personal knowledge and, as it was phrased, it would not call for revealing what legal counsel may have advised him. Second, Mr. Bisiules was asked whether he received a litigation hold letters instructing him to preserve documents, and he declined to answer on the grounds of privilege. Both CommScope and Rosenberger cite authority agreeing with Mr. Bisiules's conclusion that a litigation hold letter is privileged. See ECF 566 at pages 77 and 79, absent spoliation, which was not alleged or shown by Rosenberger. So he properly declined to answer about the litigation hold letter, though his counsel should have instructed him not to do so. Finally, there were several additional questions

about whether the witness searched his work files and

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personal devices for relevant information as part of this See Exhibit JJ at pages 243, 244, and 245. litigation. ought to have answered those questions, which did not, as phrased, seek privileged information. So Rosenberger's request on this issue is granted, consistent with what I just said. Rosenberger's counsel may take another one-hour deposition of Mr. Bisiules on -- to ask what he did and what he searched to seek documents relevant to this litigation and what efforts he made to preserve documents that might be relevant. Or counsel may work out a declaration answering these questions, if Rosenberger prefers, but that's Rosenberger's choice. All right? That's the last issue. Is there anything else the parties wish to raise, Mr. Kahnke? MR. KAHNKE: Just one thing, Your Honor, you've directed additional documents to be produced. We do have a deadline coming up for expert reports. THE COURT: Right. MR. KAHNKE: I don't know if we might request a specific deadline by which that information be produced or get guidance from the Court. THE COURT: Yeah. I mean, that and we're reopening some depositions, so I don't know how that squares with your existing expert reports. I don't know what overlap there is

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   between expert and fact discovery.
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              So I'm going to issue my order -- I don't like to
    just pick out of a vacuum, dates for production. I like them
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 4
    to be realistic.
 5
              So why don't counsel confer -- you know, or counsel
 6
   might appeal. So this is what I'm going to do. I'm going to
 7
   memorialize really in bare-bones form in an order what the
 8
   bottom line is of what I held. This transcript will be
 9
   prepared. This will be my oral opinion supporting it.
                                                             Ι
10
   won't put dates, and you take what I did and confer with one
11
    another and come up with a timeline and compare it to the
12
    expert reports and -- you know a lot more about all that than
13
    I do of how it's going to affect expert. Send me a
14
    subsequent submission, preferably joint, about dates and how
15
    the expert schedule is affected.
16
              I think I just pushed out the expert schedule by
17
    quite a bit.
                  So...
18
              MR. KAHNKE:
                           Understood.
                                        Thank you.
19
              THE COURT: All right.
20
              Mr. Filardo, anything else?
21
              MR. FILARDO: Nothing further from defendants,
22
    Your Honor.
23
              THE COURT:
                         Okay.
                                 Thank you.
                                             We're off the
24
    record.
25
                     (Conclusion of proceedings)
```

|Hearing |19-cv-15962, January 25, 2024 |Certification

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1 Certification 2 I, SARA L. KERN, Transcriptionist, do hereby certify 3 that the 103 pages contained herein constitute a full, true, and accurate transcript from the official electronic 4 5 recording of the proceedings had in the above-entitled 6 matter; that research was performed on the spelling of proper 7 names and utilizing the information provided, but that in 8 many cases the spellings were educated guesses; that the 9 transcript was prepared by me or under my direction and was done to the best of my skill and ability. 10 11 I further certify that I am in no way related to any of 12 the parties hereto nor am I in any way interested in the outcome hereof. 13 14 15 16 17 S/ Sara L. Kern 18 1st of February, 2024 19 Signature of Approved Transcriber Date 20 21 Sara L. Kern, CET**D-338 22 King Transcription Services, LLC 3 South Corporate Drive, Suite 203 23 Riverdale, NJ 07457 (973) 237-6080 2.4 25